

Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)

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PREFACE

Litigation regarding liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)¹ for the cleanup of sites contaminated with hazardous substances is booming. Between January and August 1990, two courts of appeals decided a critical issue concerning the potential liability of shareholders whose corporations are liable for cleanup under CERCLA. One court held that CERCLA can impose liability directly on shareholders without having to resort to traditional theories of shareholder liability such as piercing the corporate veil.² The other court reached the opposite result and held that shareholders could not be held liable directly under CERCLA and that the rule of limited liability prevails.³ Two other circuit courts and more than a dozen district courts have considered the question.⁴ This conflict among the courts raises questions of statutory interpretation and of the fundamental relationship between CERCLA and state corporation laws, which generally grant limited liability to shareholders. The magnitude of the problem and the large number of cases suggest this issue is bound for resolution either by the United States Supreme Court or, since CERCLA is due for reauthorization in 1991, by Congress.⁵

1. 42 U.S.C.A. §§ 9601-9657 (West 1983 & Supp. 1990). Enacted in 1980, CERCLA was reauthorized in October 1986 for an additional five years by the Superfund Amendments and Reauthorization Act (SARA) (Pub. L. 99-499, 100 Stat. 1613). See 42 U.S.C.A. § 9611(a) (West Supp. 1990). This authorization will expire in 1991.

For ease of reference, all references to CERCLA will be to the section numbers as they appear in Title 42 of the United States Code, rather than to the sections of the Act as originally enacted or reauthorized. CERCLA and its amendments are also commonly known as "Superfund."

2. *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

3. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

4. The other two courts of appeals' decisions are *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987), and *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985). The district court cases are listed *infra* notes 105 and 106.

5. See *supra* note 1. Although CERCLA is ten years old, most of the litigation regarding CERCLA liability has occurred in the last five years. In the early 1980s the Environmental Protection Agency (EPA), was surrounded by scandal and controversy. See R. GASKINS, *ENVIRONMENTAL ACCIDENTS* 231 (1989). See also, U.S. Dep't Commerce, Environmental Protection Agency, *A Management Review of the Superfund Program* 2 (1989) (PB90-153875) [hereinafter "EPA Management Review"] and thus little progress was made toward achieving the goals of CERCLA in its early years. See, EPA Management Review at 2. For a recent review of the "ten years" of Superfund litigation, see Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response Compensation and Liability Act of 1980*, 45 BUS. LAW. 923 (1990).

The concept of limited liability is discussed briefly in Part I. Part II discusses the two traditional exceptions to the rule of limited liability, piercing the corporate veil and the "corporate actor" rule. When a corporation is liable under CERCLA, these traditional exceptions continue to provide grounds for shareholder liability. The government must be cautious in using the traditional theories, however, since other creditors may follow the government's lead and may also recover against the shareholder, which could reduce the government's recovery. Some guidelines are suggested for when the government should and should not pursue shareholders on traditional bases.

Part III explains the statutory scheme of CERCLA and analyzes the cases that have considered direct shareholder liability. Part IV suggests and analyzes three inquiries which courts should make in any action brought against a shareholder directly under CERCLA. First, a traditional statutory analysis concludes that shareholders can be held liable directly under CERCLA. Second, the interplay between CERCLA and limited liability shows that CERCLA liability is not subject to the state-based rule of limited liability. The federal courts have the power to create federal common law, and in so doing must create uniform rules of decisions in CERCLA cases independent of state law. To the extent CERCLA conflicts with the rule of limited liability, CERCLA should prevail. Third, the factors relevant to setting the parameters of direct shareholder liability under CERCLA are discussed. Since Congress will decide whether to reauthorize CERCLA within the year,⁶ it should also consider clarifying the liability provisions.⁷

I. INTRODUCTION: LIMITED LIABILITY FOR SHAREHOLDERS

While most courts have held that a shareholder can be held directly liable under CERCLA, the United States Court of Appeals for the Fifth Circuit recently refused to do so by basing its holding on the state law based principle of limited liability.⁸ Thus, a tension now exists in the cases between the concept of limited liability and direct imposition of liability on shareholders under CERCLA. Furthermore, in the absence of direct CERCLA liability, limited liability

6. See *supra* note 1.

7. The focus is on the closely held corporation and it makes no difference whether the limited number of shareholders are individuals or another corporation as in the parent/subsidiary relationship. Courts have not distinguished between the liability of shareholders who are individuals and those who are corporations. Most courts see the two as virtually identical. See *United States v. Nicolet*, 712 F. Supp. 1193, 1203 (E.D. Pa. 1989); *United States v. McGraw-Edison Co.*, 718 F. Supp. 154, 156-57 (W.D.N.Y. 1989).

Persons other than shareholders may be liable under CERCLA. Officers and directors and even certain employees may fit within a liability category. Indeed, many of the concepts discussed in this Article can be applied to those other persons (such as the test for determining whether one is an "operator"). Shareholder liability, however, presents a number of unique problems. First, some shareholders have the absolute power to control the corporation's activities by virtue of the amount of their stock ownership. While other persons only have the control given them by their job description or other authority, a majority shareholder's ability to control comes with the territory. Second, the special status given shareholders under state corporate laws with respect to limited liability has resulted in a conflict among the courts considering this matter and needs to be resolved. Third, shareholder liability, by definition, includes the problem of parent/subsidiary relationships.

8. See *infra* text accompanying notes 158-70.

provides the protective shield which must be "pierced" in some way or another to hold shareholders liable for the acts of their corporations.

The origin of corporations is obscure⁹ and it is unclear whether limited liability was part of the early corporate form.¹⁰ In the United States the corporate form has always been a creature of the legislature and not a part of the common law.¹¹ Limited liability has been a standard part of the statutory corporate form since the mid 1800s¹² and remains a fundamental part of corporate law.

The effects of limited liability on both the business community and on society continue to be debated as part of the question of whether limited liability is a desirable attribute of modern corporate law. The traditional wisdom held that limited liability served to promote the industrial revolution, but even its necessity to the success of the industrial revolution in the United States has been questioned.¹³

Limited liability is generally believed to encourage investment and thereby promote commercial and industrial growth.¹⁴ Most contemporary writers who defend the rule of limited liability do so on the grounds that it encourages and facilitates the trading of shares in the market,¹⁵ a justification applicable only to publicly held corporations.¹⁶ Although the courts have not explicitly made the distinction between publicly and closely held corporations, we see the effect of the fundamental differences of these two corporate forms in cases involving questions such as piercing the corporate veil. Veil piercing cases involve closely held corporations.¹⁷

Some writers have suggested that limited liability should not apply to the claims of "involuntary" creditors, *i.e.*, those who cannot bargain with the corpo-

9. See J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE U.S. 1780-1970*, 6-8 (1970); Berle, *Historical Inheritance of the Business Corporation*, reprinted in *SOCIAL MEANING OF LEGAL CONCEPTS* (Cahn ed. 1952). See also, I F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 486-511, which shows the uncertain pedigree of the corporate form (2d ed. 1968).

10. See E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, 373-76 (1954); Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1351 and n.1, 1356-57 (1948); See also Kessler, *With Limited Liability for All: Why Not a Partnership Corporation?* 36 FORDHAM L. REV. 235 (1967) who concludes that limited liability was probably not a "natural corporate right." *Id.* at 240. See *infra* notes 171-78 and accompanying text for a further discussion of the corporate form and limited liability.

11. J. HURST, *supra* note 9, at 8-9; I. WORMSER, *FRANKENSTEIN INCORPORATED* 15, 17 (1931).

12. E. DODD, *supra* note 10, at 472-82.

13. See Dodd, *supra* note 10, at 1378-79.

14. See Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371 (1981) and authorities cited therein.

15. One such justification is that limited liability supports and advances investment in enterprises by large numbers of investors and facilitates the trading of shares in the market. See Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-101 (1985); Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499 (1976); Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262-63 (1967).

Others have criticized this view. See Meiners, Mofsky & Tollison, *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 358-59 (1979); Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986) (arguing that several of the contemporary rationales for limited liability do not apply to the parent/subsidiary relationship).

16. See, e.g., Easterbrook & Fischel, *supra* note 15.

17. Barber, *supra* note 14, at 372. See also Easterbrook & Fischel, *supra* note 15, at 109 and n.37 (saying that "[a]lmost every case" involving veil piercing has involved a closely held corporation and then explaining that they limited their statement to "almost" because all cases had not been examined).

ration before the debt to them arises.¹⁸ These involuntary creditors include tort creditors and creditors such as the United States or a state government holding claims for the cleanup of contaminated sites. A lender can choose not to lend to the corporation. The lender can compensate for limited liability by increasing the interest rate it charges, or by having the shareholders guarantee the loans to the corporation. Additionally, a lender can negotiate security for its loan. Tort creditors do not have these choices.¹⁹ They have no opportunity to bargain with the corporation and make an informed choice whether to "lend" to the corporation. Arguably, exceptions to the rule of limited liability should be applied more readily to the nonconsensual creditor, allowing recovery from the shareholders. In the CERCLA context, however, courts have not usually distinguished tort claims from contract claims and some courts have explicitly refused to recognize any difference.²⁰

II. SHAREHOLDER LIABILITY FOR CLEANUP UNDER PRINCIPLES OF CORPORATE LAW: PIERCING THE CORPORATE VEIL AND THE "CORPORATE ACTOR" RULE

Exceptions to the rule of limited liability have existed almost as long as the rule itself. There are two traditional exceptions to limited liability that are potentially applicable for shareholder liability for the cleanup of sites contaminated with hazardous substances: 1) piercing the corporate veil; and 2) the "corporate actor" rule.²¹

A. *Piercing the Corporate Veil*

The most well known exception to the rule of limited liability is that of piercing the corporate veil, which allows a court to disregard the corporate form and impose liability upon the owners of a corporation. The shareholders become liable for the acts of the corporation.

Courts have pierced the veil usually when the corporation is closely held.²² In the CERCLA context all of the veil piercing cases to date have involved a closely held corporation in which the shareholder was another corporation (a parent/subsidiary relationship). Although the courts have not based their decisions on the fact that the shareholder is another corporation it is worth keeping

18. See, e.g., Manne, *supra* note 15, at 263; Meiners, Mofsky & Tollison, *supra* note 15, at 364-67; Barber, *supra* note 14, at 390; Note, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?* 76 YALE L.J. 1190 (1967). Others suggest that the problems of involuntary creditors need to be solved by other methods. See, e.g., Posner, *supra* note 15, at 519-20 (suggesting that those engaged in a dangerous activity be required to post a bond to cover tort liability).

19. For a discussion of some of these issues see Note, *supra* note 18. State governments do have the option of enacting statutes providing them with liens for environmental claims. For some of the limitations on the current usefulness of these liens see *infra* note 88.

20. See, e.g., *In re Acushnet River and New Bedford Harbor Proceedings: Re Alleged PCB Pollution*, 675 F. Supp. 22, 31-32 (D. Mass. 1987).

21. This term was created by the author of Note, *Officer and Shareholder Liability Under CERCLA: United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 34 WASH. U.J. URB. & CONTEMP. L. 461, 474-71 (1988) [hereinafter "*Northeastern*"].

22. See *supra* note 17 and accompanying text.

this fact in mind. For the most part, however, these cases are treated here as one category of the closely held corporation.²³

1. *Applicable Law*

Courts develop "federal common law" when a case is based on a federal statute or other federal interest.²⁴ In developing this federal common law the courts may adopt state law or create a federal rule of decision.²⁵ In the CERCLA context most courts have said explicitly that they are developing a federal rule of decision in the interest of national uniformity rather than adopting state law veil piercing principles.²⁶ Having thus decided to create a federal rule, these courts have nonetheless noted that there is little difference between state law and the evolving federal law on the standards necessary to pierce a corporate veil.²⁷ Nonetheless, the courts have the ability to develop a uniform federal rule instead of applying rules that might vary from state to state.

23. One difference between the corporate shareholder and the individual shareholder is a practical matter of proof. When an individual is a shareholder and performs an act, it can be identified as an act of that individual as well as an act on behalf of the corporation. When a parent and a subsidiary share officers, directors, or managers, it may be difficult to prove that they acted for the parent in addition to acting for the subsidiary.

Several commentators analyze the parent/subsidiary cases as a separate group. See Barber, *supra* note 14, at 373, 399; Easterbrook & Fischel, *supra* note 15, at 109-11.

Judge Easterbrook and Professor Fischel defend on economic grounds this preference of the courts to pierce a veil only in cases of closely held corporations or parent/subsidiary relationships and find additional economic reasons why the veil should be pierced in parent/subsidiary cases. *Id.*

24. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 950-53 (1986). Federal common law is discussed in more detail regarding the interplay between state and federal law. See *infra* text accompanying note 340. For a discussion of veil piercing under federal standards generally see Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

25. See *infra* text accompanying note 340.

26. Mobay Corp. v. Allied-Signal, Inc., 753 F. Supp. 1248 (D. N.J. 1991); City of N.Y. v. Exxon Corp., 112 Bankr. 540, 552-53 (S.D.N.Y. 1990); United States v. Kayser-Roth Corp., 724 F. Supp. 15, 19-20 (D.R.I. 1989) *aff'd in part* 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991); United States v. Nicolet, 712 F. Supp. 1193, 1201-02 (E.D. Pa. 1989); *In re Acushnet River and New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22, 30-31 (D. Mass. 1987) [hereinafter "*In re Acushnet River*"]. In *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991) the court did not discuss the question of whether state law or federal common law applied. The court followed an earlier Fifth Circuit decision, which the district court had pointed out was based on Texas law, but which was based on the veil piercing standards developed in that circuit. *Joslyn*, 696 F. Supp. 222, 227, and which the lower court said was applicable to its reasoning whether state or a federal common law applied. 696 F. Supp. 222, 226 n.8.)

In re Acushnet River had an added wrinkle to the question of the choice of law in the veil piercing question. The parent corporation did not have the minimum contacts with the forum state (Massachusetts) necessary to establish personal jurisdiction. Personal jurisdiction existed only if the veil was pierced and the parent was treated as the alter ego of the subsidiary since the subsidiary had the requisite contacts. The defendant/parent argued that since personal jurisdiction was based on the state long-arm statute, state law should apply to the piercing question. 675 F. Supp. at 30. The court disagreed that jurisdiction could be exercised only over those who would be subject to the jurisdiction of the state court. *Id.* It also disagreed with the argument that a state court deciding the veil piercing issue under CERCLA could apply state law. The court held federal law controls the veil piercing issue in a CERCLA action. *Id.* at 30-31.

27. United States v. Kayser-Roth Corp., 724 F. Supp. 15, 20 (D.R.I. 1989), *aff'd in part* 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991); United States v. Nicolet, 712 F. Supp. 1193, 1201-02 (E.D. Pa. 1989); and *In re Acushnet River*, 675 F. Supp. 22, 33 (D. Mass. 1987).

2. *Traditional Tests for Piercing the Corporate Veil*

Those who have studied limited liability and the piercing doctrine generally agree that the issues as they have been analyzed and applied by the courts defy easy understanding.²⁸

Courts and commentators often cite two main factors used to decide whether to pierce a corporate veil:²⁹ 1) disrespect for the corporate form, such as failure to observe corporate formalities by the shareholder; and 2) indications of fraud or inequity.³⁰ Yet these standards remain vague and courts and commentators alike do not apply the standards in any consistent manner.³¹ Further, it is unclear whether both factors or only one must be met before the court can pierce the veil, although the commentators indicate both should be present.³²

3. *Piercing the Corporate Veil in CERCLA Cases*

Only a few of the many cases concerning shareholder liability under CERCLA have considered the question of piercing the corporate veil. Upon first review of the cases, one might have the impression that veil piercing in CERCLA cases is a subset of veil piercing generally. That is, for the most part, the courts have followed or adopted traditional veil piercing standards³³ and have refused to adopt an easier standard for veil piercing in the CERCLA context. However, a closer examination of the cases shows that a federal rule specific to CERCLA cases is developing. The district courts have a new focus to their

28. As Judge Easterbrook and Professor Fischel have remarked, "'Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law." Easterbrook & Fischel, *supra* note 15, at 89 (footnote omitted).

Judge Easterbrook and Professor Fischel examine both limited liability and the piercing doctrine from an economic perspective. With respect to veil piercing, they conclude that it is an attempt by courts to "balance the benefits of limited liability against its costs." *Id.* at 109. When limited liability offers few benefits, but creates a "high probability that a firm will engage in a socially excessive level of risk taking," the court is more likely to pierce the veil. *Id.* See also Epperson & Canny, *The Capital Shareholder's Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in The District of Columbia, Maryland, and Virginia*, 37 CATH. U.L. REV. 605, 612-13 (1988).

29. Since many commentators have explored the general subject of piercing the corporate veil, this discussion is intended to provide a brief background for the following discussion of the rule of piercing the corporate veil in CERCLA cases.

30. See Epperson & Canny, *supra* note 28, at 612-13; Barber, *supra* note 14, at 376; Note, *supra* note 24, at 854.

31. For example, some view inadequate capitalization as a fact that will show that unfairness or inequity exists, that is, an indication that the second factor is present. See Barber, *supra* note 14, at 386; Epperson & Canny, *supra* note 28, at 613; Note, *supra* note 24, at 854-55. Others view inadequate capitalization as an independent factor that has been considered by the courts. Easterbrook & Fischel, *supra* note 15, at 354-55.

The tests and results in veil piercing cases vary widely in the three adjoining judicial districts: the District of Columbia, Maryland, and Virginia. Epperson & Canny, *supra* note 28.

32. The commentators set forth this as a two-prong test and have indicated that both prongs must be met. See Barber, *supra* note 14, at 376-77 (but also suggesting that in the parent/subsidiary context some courts have focused primarily on the first prong. *Id.* at 397-99) and Note, *supra* note 24, at 854-55. However, the courts have not been so diligent. See, e.g., *Shore Realty*, 759 F.2d at 1052, setting forth the two prongs in the disjunctive in a case involving an individual shareholder.

33. For example, courts include in their general discussion of veil piercing such traditional bases as fraud. See, e.g., *United States v. Nicolet, Inc.*, 712 F. Supp. 1113 (E.D. Pa. 1989) (principles of equity); *United States v. Kayser-Roth, Inc.*, 724 F. Supp. 15 (D.R.I. 1989); *United States v. Exxon*, 112 Bankr. 540 (S.D.N.Y. 1990).

inquiry: whether there was "pervasive control" by the shareholder over the corporation. The test and the factors that the courts have used to determine the element of pervasive control provide more guidance to attorneys, clients, and governmental plaintiffs than do traditional veil piercing principles.

The only court of appeals to address the question of veil piercing in the CERCLA context³⁴ was the Fifth Circuit in *Joslyn Manufacturing Company v. T.L. James & Company, Inc.*³⁵ The court said a corporate veil should only be pierced when the corporate form "is used as a sham to perpetrate a fraud or avoid personal liability."³⁶ It followed an earlier decision which had focused on the control the parent exercised over the subsidiary.³⁷ Specifically, the court said the veil could be pierced if there were "total domination of the subservient corporation."³⁸ Since the lower court had appropriately reviewed all of the facts and found such control lacking, the court affirmed the lower court's decision to refuse to pierce the veil. Specifically, the facts showed that corporate formalities had been observed, such as keeping separate books and records, holding shareholder and director's meetings, keeping separate the daily operations of parent and subsidiary, and the subsidiary owned its own property, filed separate tax returns, and paid its own bills.³⁹

One of the earliest cases to consider in depth the question of whether to pierce a corporate veil was *In re Acushnet River*,⁴⁰ which involved a well capitalized, fairly independent subsidiary. The government urged the court to ease the standard for veil piercing in this CERCLA case and argued that the veil should be pierced whenever a parent owns 100 percent of a subsidiary and there is a "significant degree of involvement" in the subsidiary's affairs.⁴¹ The court refused to ease the standards for veil piercing. The court held a parent should be permitted to rely on traditional principles of corporate law to acquire and use productively a waste site by "creating a well capitalized, nonfraudulent, separate corporate subsidiary."⁴² Adopting the government's test for veil piercing would annul the effect of corporate law and would put parent companies at risk

34. One circuit court addressed the veil piercing issue in a case involving a mix of state law and CERCLA issues. *New York v. Shore Realty*, 759 F.2d 1032, 1052 (2d Cir. 1985). The question of whether the corporate veil should be pierced arose in the context of a state law nuisance abatement claim. *Id.* The court did not address the choice of law question, but it appropriately applied state law.

35. 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991). The case is especially significant for its refusal to impose direct liability on shareholders under CERCLA. *See infra* text accompanying notes 154-79.

36. 893 F.2d at 83.

37. *Id.* at 83-84.

38. *Id.* (quoting *United States v. Jon-T Chem., Inc.*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986)). *See also Joslyn*, 696 F. Supp. at 227.

39. 893 F.2d at 83. Whether a subsidiary filed its own tax returns from the period 1935 to 1950 (the period of time concerned in *Joslyn*) does not help determine one way or the other whether the corporation was being treated as the alter ego of the parent. During that time period, consolidated tax returns were sometimes filed by related companies, at other times they were not permitted and at times there was a surcharge (as high as 2% of the consolidated taxable income) for the privilege of filing consolidated returns. *See J. MERTENS, LAW OF FEDERAL INCOME TAXATION* § 46.02 (1990). In any case, the decision whether to file a joint return is one driven almost entirely by the resulting tax consequences.

40. 675 F. Supp. 22 (D. Mass. 1987).

41. *Id.* at 31-32.

42. *Id.* at 32.

for any subsidiaries which they were "more than passively interested in."⁴³ Overall, the Court showed great deference to the presumption of limited liability⁴⁴ and looked to traditional veil piercing standards to determine whether it should pierce the veil or not.

First, the court referred to the general principle found in federal veil piercing cases: "that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity.'"⁴⁵ Second, the court went on to list seven factors applied by other federal courts considering whether to pierce the veil⁴⁶ and singled out the factor of "pervasive control."⁴⁷ The court said it was considering the policies of CERCLA in deciding which factors were important.⁴⁸

In *In re Acushnet River*, the parent had formed the subsidiary in order to purchase assets that might be subject to liability under CERCLA.⁴⁹ Yet the subsidiary had a significant net worth and had remained profitable.⁵⁰ In this respect, this case is vastly different from the case in which the veil piercing question is usually raised, *i.e.*, when the corporation cannot pay its debts. The subsidiary apparently had substantial assets. Further, it never paid a dividend to the parent, it operated on its own, it negotiated its own contracts and loans, controlled its relationships with its employees, had a separate financial status, and observed certain corporate formalities.⁵¹ On the other hand, a few factors weighed in favor of piercing including: (1) the failure to formalize loan agreements between the parent and subsidiary; (2) the need for parental consent before a large capital expenditure was made by the subsidiary; (3) the parent required the subsidiary to change some accounting procedures; (4) the subsidiary generated financial forecasts for the parent and provided financial reports; and (5) the parent's initials were included on the subsidiary's logos.⁵² Nevertheless, the court held that there must be more "integration" between the two corporations to justify piercing.⁵³

43. *Id.*

44. *See, e.g.*, 675 F. Supp. at 35. "If limited liability is to remain the rule and not the exception, then this generally accepted structure ought not to be torn down absent statutory authorization." *Id.*

45. *Id.* at 33 (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981)).

46. Specifically the court listed the following factors: "(1) inadequate capitalization . . . (2) *extensive or pervasive control by the shareholder or shareholders*, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers or directors." *Id.* (emphasis added). All of these factors need not be present to pierce the corporate veil and the determination must be made on a case by case basis. *Id.*

47. *Id.* at 34.

48. *Id.* at 33.

49. *Id.* at 34.

50. *Id.* at 35. The net worth of the subsidiary at the time of the suit was \$17 million; five times what it had been when the parent acquired it. *Id.* It is, therefore, somewhat unclear why the government was attempting to recover from the parent. The veil piercing argument was raised in connection with the question of whether the court had personal jurisdiction over the parent. Thus, perhaps, the government had included the parent in the suit since it believed the parent might be responsible under CERCLA and then had to argue the veil piercing issue early on to establish personal jurisdiction. (The government did not raise a claim against the parent directly under CERCLA, in which personal jurisdiction could also have been argued.).

51. *Id.*

52. *Id.* at 34.

53. *Id.*

In deciding whether to pierce the corporate veil, the court in *United States v. Nicolet, Inc.*⁵⁴ first considered the general principle that a veil should be pierced to prevent fraud or injustice or to respect public policy.⁵⁵ The court then went on to specify a federal rule particular to veil piercing in the CERCLA context:

Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.⁵⁶

In *Nicolet*, the court denied the parent's motion for summary judgment. The pleadings alleged that the parent initially held a majority and later all of the subsidiary's stock. The parent had "actively participated in the management" of the subsidiary at the contaminated site during the time of the improper disposal, knew the subsidiary's disposal practices, had the "capacity to control the disposal and resultant release and to abate damages from the releases, . . ." and had benefited from the improper disposal.⁵⁷ The court held that these facts would be sufficient if proven at trial to pierce the corporate veil.⁵⁸

The court in *United States v. Kayser-Roth*⁵⁹ used a general test for veil piercing, saying that the veil should be pierced in the "interest of public convenience, fairness and equity."⁶⁰ In deciding whether to pierce the veil the court focused on the "overwhelming pervasive control" that the parent exercised over the subsidiary.⁶¹ Specifically, the parent controlled the environmental matters of the subsidiary, it filled most of the officer and director positions of the subsidiary with its own personnel, it approved all expenditures over 5,000 dollars, and it had almost total financial and operational control over the subsidiary.⁶² As a result of this "pervasive control" by the parent, the corporate veil was pierced. Recently, the First Circuit Court of Appeals reviewed *Kayser-Roth*, but did not consider the veil piercing issue.⁶³ The court affirmed the district court's decision

54. 712 F. Supp. 1193 (E.D. Pa. 1989).

55. *Id.* at 1202. Specifically the court said:

The federal common law in this area emerges from the general principle that "the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime."

(Citing *American Bell, Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984), which quoted an earlier case).

56. *Id.* at 1202.

57. *Id.*

58. *Id.*

59. 724 F. Supp. 15 (D.R.I. 1989), *aff'd in part*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). See *infra* text accompanying notes 185-96.

60. *Id.* at 23. The court also recited the seven factors set out in *In re Acushnet River*, but it viewed these specific factors as adding "flesh" to the more general test quoted in the text. *Id.* at 20.

61. *Id.* at 24.

62. *Id.* at 24. For a complete "laundry list" of all of the specific controls placed on the subsidiary by the parent see *infra* text accompanying note 196.

63. 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

with respect to direct shareholder liability and said that it was unnecessary to rule on the veil piercing question.⁶⁴

Although the court in *United States v. Exxon Corp.*⁶⁵ said it did not have to reach the issue of veil piercing,⁶⁶ it went on to find that the requirements for piercing the corporate veil were met. The court looked both to the general principle of veil piercing to safeguard the "interests of public convenience, fairness and equity"⁶⁷ as well as the seven specific factors set out in *In re Acushnet River*. The court relied on three facts in reaching the conclusion to pierce the veil. First, the parent corporation had pervasive control over and involvement in the affairs of the subsidiary.⁶⁸ Second, the parent was aware of the disposal activities of the subsidiary.⁶⁹ Third, there was a failure to respect corporate formalities—a traditional factor supporting veil piercing.⁷⁰ These latter two factors are, in a sense, further indications of control.

Three of the five cases considering the veil piercing question, *In re Acushnet River*, *Kayser-Roth* and *Exxon* singled out the factor of "pervasive control" as the key factor in CERCLA piercing cases.⁷¹ The other two cases also considered control as a key factor, although they did not use the phrase "pervasive control." The court in *Joslyn* relied on an earlier case the focal point of which was control.⁷² The court in *Nicolet* included in its test for piercing the veil in the CERCLA context that the parent "controlled the management and operations of the subsidiary."⁷³ In each case, the court focused on the actual control exerted by the shareholder over the corporation (in each case the parent over the subsidiary), not the mere ability to control.

Three of these courts found that the parent had exercised a sufficient level of control. In *Kayser-Roth* and *Exxon* the courts pierced the corporate veil.⁷⁴ In *Nicolet* the court denied summary judgment for the shareholder.

From these cases we can begin to discern a rule specific to CERCLA cases: a court will pierce the corporate veil when a shareholder has pervasive control over the corporation. In determining this "pervasive control," courts have been particularly interested in the control shareholders have actually exercised over corporate finances and operations. The specific factors that appear in several of the decisions are: the amount of shares owned (in each case, a majority), the

64. *Id.* at 28, n.11.

65. 112 Bankr. 540 (S.D.N.Y. 1990).

66. *Id.* at 552. The court held a parent corporation directly liable under CERCLA as an "arranger" and a "transporter" since the parent had actively participated in and had the authority to control these activities. *Id.* at 546-52. See *infra* text accompanying notes 307-13.

67. 112 Bankr. at 553 (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981)).

68. *Id.*

69. *Id.*

70. Specifically, the board of directors of the subsidiary never met, there was a lack of corporate separateness and there were various financial controls over the subsidiary. *Id.*

71. *In re Acushnet River*, 675 F. Supp. 22, 33; *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 23, 24 (D.R.I. 1989); and *New York v. Exxon*, 112 Bankr. at 553.

72. 893 F.2d at 84, *cert. denied*, 111 S. Ct. 1017 (1991) (see also the district court opinion 696 F. Supp. at 227).

73. *United States v. Nicolet, Inc.*, 712 F. Supp. at 1202.

74. The court in *Exxon* said it would pierce the veil although it said it need not reach the issue. 112 Bankr. at 552.

appointment or placement of directors and management personnel, financial control (especially the borrowing of money, accounting supervision, payment of bills, collection of accounts receivable, and the approval of expenditures), control over certain aspects of the subsidiary's operation, control over certain types of transactions (such as purchase or movement of capital assets, all real estate transactions whether purchase, sale or lease) and some control over or awareness of environmental matters.⁷⁵

The veil piercing test in CERCLA cases is both tied to the past and a step forward. It is tied to the traditional test in that courts considering the piercing question generally refer first to the purpose of veil piercing as one of preventing fraud or inequity. In addition, like traditional tests, the CERCLA test requires courts to decide veil piercing questions on a case by case basis looking closely at the facts of each. The new test breaks with the past since it does not adhere to the traditional two-prong test, which required not only fraud or inequity but also a showing of the disrespect for the corporate form. This does not mean the test is less rigorous. It does mean that the test is more specific to CERCLA. In developing a uniform rule of decision for piercing the corporate veil in CERCLA cases, it is appropriate to consider the policies of the statute.⁷⁶ Congress intended to place the costs of cleanup on those who were "responsible" for the disposal.⁷⁷ Generally, a shareholder who exercises so much control over the corporation that the control is for all practical purposes complete, or "pervasive," may be considered "responsible" for the disposal. Thus, the new test is consistent with the legislative intent.

4. Viability of Veil Piercing in CERCLA Cases

Of the twenty or more reported cases concerning shareholder liability for CERCLA claims, only five have considered the question of veil piercing.⁷⁸ In

75. In *Exxon*, the court recited the following factors: amount of stock owned (all), power to appoint officers and directors, common officers and directors, funding of salaries, authority over "major" expenditures, negotiations of certain transactions, loan guarantees, funding of operations, contact with customers, and paying for insurance coverage. *Id.* at 549 (incorporated into the piercing question at 553). In *Kayser-Roth*, the court recited the factors of: monetary control, budget restrictions, control over certain transactions (government contracts, including environmental matters), approval of real estate transactions (leases, purchases and sales), approval of expenditures over \$5,000, placement of management and director personnel. 724 F. Supp. at 22. In *Nicolet*, the court was more general, referring to the facts of: majority shareholder status, participation in the management of the site while toxic materials were being disposed, familiarity with disposal practices, "capacity to control" and "ability to abate" damages from the disposal, and benefit to the shareholder from the disposal practices. 712 F. Supp. at 1202-03.

76. In developing uniform rules that relate to a specific statute, it is necessary to consider and attempt to further the goals and purposes of the underlying statute. Courts have recognized the specific need to consider the purpose of CERCLA in developing the standards for veil piercing. *See, e.g., In re Acushnet River*, 675 F. Supp. at 22, 32-33 (D. Mass. 1987).

77. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 1, 33, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136. The meaning of "responsible" as used by Congress is discussed *infra* text accompanying notes 323-24.

78. Other courts have considered the veil piercing question in passing. *See, e.g., United States v. Carolawn*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,698 (D.S.C. 1984) (seemingly confusing veil piercing and the corporate actor rule, but in either event allowing the matter to be tried) and *United States v. Mottolo*, 605 F. Supp. 898, 914 (D.N.H. 1985) (it was not necessary for the government to raise the piercing issue since liability could rest on other grounds), *United States v. McGraw-Edison Co.*, 718 F. Supp. 154 (W.D.N.Y. 1989).

two cases the court actually pierced the corporate veil⁷⁹ and in one other the court allowed the government to pursue the issue at trial by denying summary judgment for the shareholder.⁸⁰ The other two courts refused to pierce the corporate veil given the facts presented.⁸¹

Veil piercing is often unnecessary in a CERCLA case. In fact, in some cases piercing the corporate veil will actually hurt the government's ability to recover. First, a case which presents facts supporting veil piercing will often also support direct liability under CERCLA.⁸² All three courts that pierced the corporate veil or allowed the issue to be tried, (*Kayser-Roth*, *Nicolet*, and *Exxon*) also imposed liability on the shareholders directly under CERCLA.⁸³ Other courts have explicitly avoided the question of piercing the veil when they imposed liability directly upon shareholders under CERCLA.⁸⁴

Second, the government pays both a small price and a large price for pursuing a piercing claim. The small price is the cost of the additional litigation. Since the CERCLA statute imposes liability directly on the shareholder in many cases, it makes the difficult task of piercing the veil unnecessary in those cases. The large price is that the government may have to share the assets of the shareholder with all or some of the other creditors. By piercing the corporate veil, the government paves the way for other creditors to pierce the corporate veil. Other creditors may assert the doctrine of collateral estoppel or "issue preclusion" to impose liability on the shareholder under a veil piercing theory.⁸⁵

79. *United States v. Kayser-Roth, Corp.*, 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991) and *United States v. Exxon*, 112 Bankr. 540, *partial summary judgment granted*, 744 F. Supp. 474 (S.D.N.Y. 1990); *see supra* text accompanying notes 59-64 and 65-70, respectively.

80. *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989); *see supra* text accompanying notes 54-58.

81. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (1990), *cert. denied*, 111 S. Ct. 1017 (1991); *In re Acushnet River*, 675 F. Supp. 22 (D. Mass. 1987).

82. If a shareholder is so involved with the activities of the corporation so as to have "pervasive control" it is also likely that in many jurisdictions the shareholder will be liable as an "operator" directly under CERCLA. *See infra* Parts III and IV.

83. *See infra* text accompanying notes 185-96, 232-42, 307-13.

84. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1985), *cert. denied* 484 U.S. 848 (1987). *United States v. Mottolo*, 605 F. Supp. 898, 913 (D.N.H. 1983).

While recognizing the favor accorded limited liability and expressing respect for it, another district court suggested that it is more appropriate to disregard the corporate form in the CERCLA context than in others. Rather than pierce the corporate veil, however, the court went on to impose liability directly under CERCLA. *Kelley v. Arco Indus. Corp.*, 723 F. Supp. 1214, 1218 n.2 (W.D. Mich. 1989); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1542 n.4 (W.D. Mich. 1989); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554, 1560 n.4 (W.D. Mich. 1989). *See infra* text accompanying notes 263-77.

85. The Supreme Court permitted the "offensive" use of collateral estoppel in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331-33 (1979). *See generally*, C. WRIGHT, *THE LAW OF FEDERAL COURTS* 685-88 (4th ed. 1983); *RESTATEMENT OF JUDGMENTS*, § 29 (1982).

Even if the court will not permit the use of this doctrine,⁸⁶ the record has been made by the government, making the task of those to follow that much easier.⁸⁷

If other creditors are successful in piercing the corporate veil (following the government's lead) and the shareholder has insufficient assets to pay all of these claims the government will recover less because it must share with other creditors.⁸⁸ Had the government pursued its claim directly under CERCLA, liability would have been imposed on the shareholder for the government's claim only, thus assuring a greater recovery than if the government had to share with other creditors. Therefore, a piercing argument should be made by the government only when it cannot impose liability directly under CERCLA. Most notably, the government cannot pursue a direct liability claim in the Fifth Circuit since that Court of Appeals has refused to recognize such a cause of action under CERCLA. Other examples are when the facts do not support imposing liability directly on the shareholder as an "owner or operator," "arranger," or "transporter," all of which are discussed in the next part.

Thus, rather than making every argument possible against a shareholder, the government must evaluate its case carefully and choose selectively the arguments it will make in order to maximize recovery on its claim. If the government decides to pursue the veil piercing question because CERCLA liability is unavailable or uncertain in a given case, it should evaluate the available assets of the shareholder and the extent of the other debts of the shareholder. If the shareholder has significant assets, and is able to pay all of the corporate creditors, pursuing the piercing claim is appropriate. If, on the other hand, the shareholder has limited assets, the government must consider whether it can obtain a

86. For example, the court can refuse to allow the creditor to use issue preclusion if the decision could be supported on alternative grounds. See C. WRIGHT, *supra* note 85, at 682. The cases that pierced the corporate veil also impose liability directly on the shareholder under the CERCLA provisions. Thus, an alternative ground for liability was present in these cases. In addition, courts are generally given broad discretion to determine when to use the doctrine. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-33 (1979). *Parklane* also sets forth three factors courts should consider in deciding whether to apply the doctrine. *Id.*

87. Although factors supporting veil piercing will often also support a direct claim under CERCLA, the reverse is not necessarily true. Those few cases which pierced the veil had very compelling facts fully supporting "pervasive control." One form of direct liability under CERCLA, however, requires that one be sufficiently involved to be the "operator" of the contaminated site or "facility." See *infra* text accompanying notes 122-23. Activities proving control over the facility might not be sufficient to support veil piercing since the facility is often only one portion of the corporation. Thus, the case will do little to aid creditors in using the facts as proved by the government to pierce the veil. On the other hand, several courts have looked at the shareholder's involvement in the corporation to determine "operator" liability and those facts once established by the government may aid other creditors in a veil piercing theory.

Finally, the standards for direct liability under CERCLA may be easier to meet than veil piercing standards. Therefore, holding a shareholder liable as an operator due to her involvement in the corporation generally may not be sufficient to support a veil piercing theory. The diligent creditor, nonetheless, can use this initial proof as a start.

88. This assumes that the government has no special priority rights or liens that would enable it to prevail over the shareholder's other creditors. CERCLA does provide a lien for cleanup costs, but it only applies to real estate and may be of limited value in pursuing the assets of the shareholder if the veil is pierced. 42 U.S.C.A. § 9607(1)(1) (West Supp. 1990). Further, the lien is subject to preexisting liens and it is possible that another creditor could follow the government in piercing the corporate veil and then move quickly to file or perfect its lien before the government properly filed its own. The other creditor would win under § 9607(1)(3). Several states have "superlien" statutes, giving governments varying rights to the assets of a person responsible for cleanup. While some might allow the government to have the first priority, others suffer from some of the same problems as the federal lien.

lien on the shareholder's property and must evaluate the priority of that lien since its recovery will be otherwise reduced by the other outstanding debt. Absent the availability of a lien the government must consider whether its claim will have priority over other general unsecured claims and, if so, the extent of the unsecured assets.⁸⁹ In the event the shareholder is or will become insolvent the government should evaluate what percentage of the total debt of the shareholder its claim comprises. Even if the shareholder has other debt, if the government's claim is a significant amount of the total debt and there are assets from which to pay a good portion of the debts, the government will receive the lion's share of the assets by virtue of the size of its claim in any insolvency proceeding.⁹⁰ In such a case it is worthwhile to pursue the piercing claim.

B. The "Corporate Actor" Rule

Courts have developed another exception to the general rule of limited liability. When a shareholder (or other individual associated with a corporation, e.g., an officer) commits a tort or other wrongdoing on behalf of the corporation, that individual can be held liable for his or her acts. This liability has been called the "corporate actor" rule.⁹¹ The Second Circuit in *New York v. Shore Realty*⁹² held a shareholder/officer responsible as a corporate actor for a common law nuisance claim. An officer who "controls corporate conduct and thus is an active participant in that conduct is liable for the torts of the corporation."⁹³ By focusing on the conduct of the shareholder/officer, the court imposed liability on the individual without having to pierce the corporate veil.⁹⁴ Similarly, in *United States v. Northeastern Pharmaceutical and Chemical Co.*,⁹⁵ the Eighth Circuit Court of Appeals imposed liability on a shareholder/officer using a combination of the corporate actor rule and direct CERCLA liability as the person who arranged for the disposal.⁹⁶

In *United States v. Mottolo*,⁹⁷ the court denied the shareholder's motion for summary judgment since he might be responsible under state law for corporate torts if he "directed or personally participated in the tortious activity."⁹⁸ Recently, in *Quadion Corp. v. Mache*,⁹⁹ the court refused to dismiss an action against shareholders who might "have actively participated or authorized the disposal of" the hazardous substance.¹⁰⁰

89. The government may have priority over some or all of the other unsecured creditors, but if most of the assets of the shareholder are fully secured, that priority will be of little practical value. Priority rights can be found both in state law and in the Bankruptcy Code.

90. "Unsecured" creditors share on a pro rata basis in a bankruptcy proceeding. 11 U.S.C. § 726(b) (1990).

91. *Northeastern*, *supra* note 21, at 464-71.

92. 759 F.2d 1032 (2d Cir. 1985).

93. *Id.* at 1052.

94. *Id.* The Court explicitly avoided the veil piercing issue.

95. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

96. *Id.* See *infra* text accompanying notes 284-91.

97. 605 F. Supp. 898 (D.N.H. 1985).

98. *Id.* at 914.

99. 738 F. Supp. 270 (N.D. Ill. 1990).

100. *Id.* at 276.

A fundamental difference exists between veil piercing and the corporate actor rule. When a corporate veil is pierced, all of the owners of the corporation are potentially liable to the creditor which successfully pierced the veil.¹⁰¹ When one or a few shareholders, officers or other "actors" commit a wrongful act, *only they are responsible* for liabilities resulting from that act.¹⁰²

The rule has another limitation. The corporate actor rule applies only to individuals who act wrongfully on behalf of a corporation and does not speak to the responsibility of parent corporations for the acts of their subsidiaries. Further, it applies only to those who actually committed the wrongdoing, not to those who were in a position of control or who had the right to control the acts of the corporation. Thus, recovery under the corporate actor rule is more limited than under a veil piercing theory. Nonetheless, the corporate actor rule is important since it may serve as a basis of liability when other theories are not supported by the facts.

As in the case of piercing the corporate veil, governments should proceed with caution in asserting the corporate actor rule lest other creditors follow suit.

C. *Summary: Piercing the Corporate Veil and the "Corporate Actor" Rule*

Overall, both the corporate actor rule and the doctrine of piercing the corporate veil have been of limited use in the CERCLA context. It is generally easier for a court to impose liability directly under CERCLA. Nevertheless, these two concepts are a well established part of corporate law and each has been applied in a few cases in the CERCLA context. These concepts cannot be overlooked by government attorneys as a means to impose liability on a shareholder, although the benefits of these theories must be weighed against the costs. Likewise they cannot be overlooked by corporate counsel in planning relations between shareholders and corporations or by attorneys advising their shareholder and corporate clients about liability for hazardous waste contamination. These doctrines will remain important when the facts do not support direct shareholder liability under CERCLA or the jurisdiction does not recognize direct CERCLA liability, such as presently in the Fifth Circuit.¹⁰³

III. DIRECT SHAREHOLDER LIABILITY UNDER CERCLA

CERCLA imposes liability on certain persons for the cleanup of sites contaminated with toxic substances. Three circuit courts of appeals¹⁰⁴ and eight

101. One commentator asserts that, theoretically, liability should only be placed on those actively involved in managing the corporation, but notes that courts have not distinguished between active and passive shareholders except in dicta. See Barber, *supra* note 14, at 372-73.

102. This distinction is also discussed briefly in *Northeastern*, *supra* note 21, at 464-65.

103. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991), discussed *infra* text accompanying note 158.

104. *United States v. Kayser-Roth*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

district courts¹⁰⁵ have held shareholders liable for cleanup under CERCLA. Another ten district courts denied a shareholder/defendant's motion to dismiss or for summary judgment on the grounds that the shareholder might be held liable under CERCLA at a trial on the merits.¹⁰⁶ This liability is direct, not derivative. It is imposed because the shareholder falls within one of the categories of persons who are statutorily liable, not because the corporation is responsible and the veil has been pierced. One circuit court has recently disagreed with these courts and has held that shareholders cannot be held liable directly under CERCLA because they are protected by the state rules of limited liability absent an indication from Congress that CERCLA altered those rules.¹⁰⁷ The conflict among the circuits focuses on the tension between CERCLA, as interpreted by most courts, and traditional notions of corporate law. The crucial question is whether CERCLA can be read to impose liability directly on shareholders or whether it is subject to the state created rule of limited liability. If CERCLA can be read to impose liability on shareholders, a second focus must be on what tests are to be applied to determine whether particular shareholders are liable and whether state law should be taken into consideration in creating the tests.

This part begins by discussing the statutory scheme established by CERCLA and then examines the circuit court and district court opinions.

A. Statutory Scheme

1. Introduction

The protection and restoration of our environment, particularly when hazardous substances are concerned, has become a national concern and priority.¹⁰⁸ Congress enacted CERCLA in 1980 to clean up and otherwise protect the public from sites contaminated with hazardous substances and to provide a fund to

105. *City of New York v. Exxon Corp.*, 112 Bankr. 540, *partial summary judgment granted*, 744 F. Supp. 474 (S.D.N.Y. 1990); *International Clinical Labs. Inc. v. Stevens*, 710 F. Supp. 466 (E.D.N.Y. 1990); *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987), *aff'd*, 910 F.2d 24 (1st Cir. 1990); *United States v. Kayser-Roth*, 724 F. Supp. 15 (D.R.I. 1989), *aff'd* 910 F.2d 24 (1st Cir. 1990); *Vermont v. Staco*, 684 F. Supp. 822 (S.D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1989); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985).

106. *United States v. Nicolet*, 712 F. Supp. 1193 (E.D. Pa. 1989); *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich. 1988); *Kelley v. Arco Indus. Corp.*, 721 F. Supp. 873 (W.D. Mich. 1989); *Kelley v. Arco Indus. Corp.*, 723 F. Supp. 1214 (W.D. Mich. 1989); *United States v. McGraw Edison Co.*, 718 F. Supp. 154 (W.D.N.Y. 1989); *United States v. Conservation Chem.*, 619 F. Supp. 162 (W.D. Mo. 1985); *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,698 (D.S.C. 1984); *United States v. Mottolo*, 629 F. Supp. 56 (D.N.H. 1984).

107. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

108. The most telling sign of this concern is the explosion in the number of programs and news stories about various aspects of the environment and the future of the planet's health. One recent decision summarized the problem as follows: "It is no secret that protection and preservation of the environment are at the forefront of our national agenda. A fine illustration of this is Congress' enactment of CERCLA and the companion HSA [the state legislation in the subject] legislation in California." *Jensen v. Bank of Am. N.T. & S.A.*, 114 Bankr. 700, 706 (Bankr. E.D. Cal. 1990).

The media attention given to Love Canal and other infamous sites in the late 1970s helped bring about this national concern over toxic pollution. See, e.g., M. BROWN, *LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS* (1980).

support cleanup and related measures.¹⁰⁹ Toxic substance contamination is much greater than originally expected when CERCLA was passed in 1980.¹¹⁰ In 1989 the expected cost of cleaning up all sites on the then *current* National Priorities List was 30 billion dollars.¹¹¹ Estimates place the total cost of cleanup in the hundreds of billion dollar range.¹¹² Cleanup efforts will last well into the next century, if not the century beyond.¹¹³

To meet CERCLA's purpose, Congress established the "Hazardous Substance Superfund"¹¹⁴ and gave the federal government broad authority to cleanup contaminated sites. Specifically, CERCLA authorizes the federal government in many cases to "remove or arrange for the removal" of hazardous substances, to provide for "remedial action" and "to take any other response measure."¹¹⁵ The "Hazardous Substance Superfund" pays for the cleanup.¹¹⁶ The federal government will then attempt to replenish the Superfund by seeking

109. See H.R. REP. NO. 1016, 96th Cong. 2d Sess., pt. 1, at 23, 25, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6126, 6128. See also remarks of Rep. Florio, 126 CONG. REC., pt. 24, 31,964 (1980).

CERCLA is in a sense a Congressional response to one type of a "mass tort." For a more general discussion of the subject of shareholder liability when a corporation cannot pay for its past acts, see Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984); Green, *Successor Liability: The Superpriority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17 (1986).

These articles, however, focus on how a large "mass tort" liability can be allocated in the future through the division of the corporation's assets, successor liability and the like. For the most part, they do not consider shareholder liability as it has been developed under CERCLA.

110. Congress thought the toxic waste problem was limited to several hundred sites around the country that had been abandoned and needed to be cleaned up. EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM, 1 (1989). By 1989 over 30,000 sites had been "identified as possible candidates for Superfund." *Id.* at 2. Each year approximately 2,000 sites are added to the list of sites to be evaluated. *Id.* at 1-7. Approximately 5% of those identified and evaluated are placed on the National Priorities List. *Id.* at 1-6. The current National Priorities List contains 1,200 sites. It is expected to grow to 2,100 by the year 2000. *Id.* at 2, and pages 1-6 to 1-7. Given current funding levels, the EPA can begin cleanup on about 40 sites per year. Another 50 per year are financed by responsible persons (with EPA supervision). *Id.* at 1-7. Since some sites can take decades or even centuries to cleanup, the cleanup of the country's hazardous waste sites will take a very long time. *Id.*

111. *Id.* at 3.

112. See R. GASKINS, ENVIRONMENTAL ACCIDENTS 64-65, 231 (1989) and authorities cited therein.

113. See *supra* note 110.

114. The "Hazardous Substance Superfund" is established pursuant to 26 U.S.C. § 9507. Appropriations from the fund for CERCLA are made pursuant to 42 U.S.C.A. §§ 9611 and 9612 (West 1983 & Supp. 1990). With the 1986 amendments to CERCLA funding was increased to \$8.5 billion to be allocated from the fund over five years beginning in October 1986 for CERCLA purposes. 42 U.S.C.A. § 9611 (West Supp. 1990).

The sources of the fund include a general corporate tax, taxes on the import and export of petroleum and the sale of certain chemicals, and appropriations from general revenues. 26 U.S.C.A. §§ 59(A), 9507, 4611, 4661, 4671 and 42 U.S.C.A. § 9611(P) (West 1983 & Supp. 1990).

115. 42 U.S.C.A. § 9604(a)(1) (West 1983 & Supp. 1990) provides:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

The President's authorization to undertake these tasks has been delegated to the EPA. Exec. Order No. 12,316, 46 Fed. Reg. 42, 237, *reprinted in* 42 U.S.C.A. § 9615 at 544-46 (Aug. 14, 1981).

"The terms 'remove' or 'removal' mean the cleanup or removal of released hazardous substances from the environment" 42 U.S.C.A. § 9601(23) (West Supp. 1990). "The terms 'remedy' or 'remedial action' means those actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate. . ." 42 U.S.C.A. § 9601(24) (West Supp. 1990). "Remove," "removal," "remedy," and "remedial action" are all in-

recovery from persons responsible for the contamination. In the alternative, the state or other party may pay for the cleanup¹¹⁷ and then seek to recover directly from those who are responsible.¹¹⁸

Establishing responsibility for the cost of cleanup is important for several reasons. First, any funds collected from those responsible are used to reimburse the "Hazardous Substance Superfund," making further cleanup and other CERCLA activities possible. Second, the Environmental Protection Agency has expressed a clear policy of seeking to negotiate settlements with those responsible for a cleanup to perform the cleanup.¹¹⁹ Establishing rules of liability encourages those who may be responsible under CERCLA to undertake cleanup.¹²⁰ Voluntary agreements free up funds to be used elsewhere and they lower the administrative and judicial costs of first having the government perform the cleanup and then bring suit to recover its costs.

cluded within the terms "respond" or "response." 42 U.S.C.A. § 9601(25) (West Supp. 1990). Cleanup costs are often referred to as "response" costs.

116. 42 U.S.C.A. § 9611(a) (West Supp. 1990). *See also* 42 U.S.C.A. § 9612(a) (West Supp. 1990) for prerequisites to payment.

117. *See* 42 U.S.C.A. §§ 9604(a)(1) and 9604(d) (West 1983 & Supp. 1990). In addition, many states have other environmental legislation that affects the cleanup of toxic waste sites and specifies the persons who are liable for cleanup costs. For a summary of the state provisions that existed in 1983 see Warren, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 ENVTL. L. 10, 348 (1983). New Jersey has one of the most stringent sets of environmental laws. For a discussion of its provisions see Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV. ENVTL. L. REV. 245 (1989). Some state statutes predate the federal legislation. Some extend liability to the shareholder and officers of closely held corporations. *See, e.g.*, the situation presented in *Ohio v. Kovacs*, 469 U.S. 274 (1985).

States share some of the cost of cleanup paid for by Superfund, usually 10%, 42 U.S.C.A. § 9604(c), but they may bear more of the cost in some cases. *See, e.g.*, 42 U.S.C.A. § 9604(c)(a) (West Supp. 1990).

Finally, the federal government may, in some cases, order a person to cleanup a site. *See* 42 U.S.C.A. § 9606 (West Supp. 1990).

118. 42 U.S.C.A. § 9607(a)(4)(A) and (B) (West Supp. 1990).

Liability is usually joint and several and if one party pays for the cleanup it can seek contribution from other responsible parties. *New York v. Shore Realty Co.*, 759 F.2d 1032 (2d Cir. 1985) and cases cited therein; *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 19 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

The Superfund Amendments and Reauthorization Act SARA, Pub. L. 99-499, enacted in 1986 provides expressly for the right of contribution. 42 U.S.C.A. § 9613(f)(1) (West Supp. 1990). That section also gives courts broad power to allocate the costs among the parties "using such equitable factors as the court determines are appropriate." *Id.* Regarding cases apportioning liability before SARA, *see United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987).

119. EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM at ii, 7, 1-11, 2-2, 2-14 (1989). The 1986 amendments gave the EPA broad authority to settle with responsible parties. 42 U.S.C.A. § 9622 (West Supp. 1990).

120. "The Cost Recovery Program serves a dual purpose for CERCLA enforcement. It is intended to both recover revenues for the Fund and to encourage voluntary PRP [potentially responsible party] cleanup action by eliminating any incentive for PRPs to allow the government to do the work." EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM, 2-23 (1989). Costs are recovered from persons responsible under 42 U.S.C.A. § 9607 (West 1983 & Supp. 1990). *See infra* text accompanying notes 121-29.

Orders compelling a person responsible to perform the cleanup (*See* 42 U.S.C.A. § 9606 (West Supp. 1990)), will also encourage responsible persons to reach voluntary agreements with the EPA. EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM, at 2-5 to 2-7 (1989).

2. Liability Provisions of CERCLA

There are four categories of persons who can be held ultimately responsible for cleanup and other response costs,¹²¹ and understanding these four categories is critical to any discussion of CERCLA liability. Liability is imposed on:

- (1) the current owner or operator¹²² of a facility;
- (2) any person who owned or operated a facility at the time of the disposal;¹²³
- (3) any person who arranged for the disposal of a hazardous waste¹²⁴ (sometimes referred to as "arrangers" or "generators");¹²⁵ or
- (4) any person who transported the waste or accepted the waste for transport to the facility (frequently referred to as "transporters").¹²⁶

"Person" includes both an individual and a corporation.¹²⁷ A "facility" is any site where a hazardous substance has been deposited or located, *i.e.*, the contaminated site itself.¹²⁸

121. CERCLA imposes liability for "all costs of removal and remedial action incurred by the United States or a state . . ." and "any other necessary costs of response by any other person. . . ." 42 U.S.C.A. § 9607(a)(4)(B) (West Supp. 1990). *See also infra* note 133.

122. 42 U.S.C.A. § 9607(a)(1) (West Supp. 1990) imposes liability on: "the owner *and* operator of a vessel or facility," (emphasis added) but other sections use the phrase "owner *or* operator" (emphasis added). *See, e.g.*, § 9601(20)(D) (defining the term "owner or operator") and § 9607(a)(2) (imposing liability on one who "owned or operated"). Courts uniformly have required only that one be an owner *or* an operator of a facility. *See, e.g.*, *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990); *New York v. Shore Realty Co.*, 759 F.2d 1032, 1052 (2d Cir. 1985).

123. 42 U.S.C.A. § 9607(a)(2)(West Supp. 1990) imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous wastes were disposed of."

124. 42 U.S.C.A. § 9607(a)(3)(West Supp. 1990), *quoted infra* note 285.

125. This category of liable persons is sometimes referred to as "generators" since those who arrange for disposal or the transportation of toxic substances are often those who produced those substances, *i.e.*, those who "generated" it.

126. 42 U.S.C.A. § 9607(a)(4) (West Supp. 1990).

127. 42 U.S.C.A. § 9601(21) (West Supp. 1990) provides: "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, commission, political subdivision of a State, or any interstate body."

128. 42 U.S.C.A. § 9601(9) (West Supp. 1990). As in other portions of CERCLA, the provisions relating to the term "facility" are less than clear and must be read together to make sense. The definitional provision says: The term "facility" means (A) any building or structure installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft, or (B) any site or area *where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located;* but does not include any consumer product in consumer use or any vessel.

§ 9601(9) (emphasis added). If (A) is read as a separate definition from (B), *any* building or structure would be a "facility"—even a building that had nothing whatsoever to do with a hazardous substance and under § 9607(a)(1) liability would be imposed on persons who own or operate a building or other facility. Both (A) and (B) are modified by the emphasized language, so that a facility is a place where a hazardous substance was "deposited, stored, disposed of, or placed, or otherwise come to be located."

The next question becomes whether that could include a plant where the waste was generated but which itself is not contaminated. For example, a factory may have created the waste as a by-product but properly disposed of the waste. Is the factory a "facility?" The definitional section is unclear. It includes places where the substance was "stored." However, the final clause suggests that "facility" means a place where the substance finally comes to rest or has been contaminated with the waste. Thus, if the factory shows no signs of contamination, it is not a "facility." This does not mean, however, that the factory (or its owner) will escape liability, for it may be considered an "arranger."

In addition, the liability provisions of § 9607(a)(2) and (3) are useful to interpret the term "facility." First, § 9607(a)(2) places liability on one who owned the facility at the time of the disposal *at the facility*. Second, § 9607(a)(3) imposes liability on those who arrange for disposal of the waste. This would cover those who generate

A person within one of these four groups is often referred to as a "responsible party" or a "potentially responsible party."¹²⁹ Liability is strict liability¹³⁰ and CERCLA provides only three very limited defenses to this liability.¹³¹ Under these CERCLA provisions creditors which foreclosed on contaminated property or who participated in the management or operation of the site have been held to be "owners or operators" and responsible for the full cost of cleanup.¹³² Officers, directors and shareholders of the enterprise have been liable as "owners or operators," as arrangers, and as transporters.

waste and do not dispose of it on their premises but instead arrange for its disposal. Subsection (a)(3) would be unnecessary if liability could be imposed upon the generator as an owner or operator of a facility under (a)(1).

129. Although not defined in CERCLA, these two terms are commonly used to refer to those persons who can be held liable for the cleanup costs under § 9607(a). The EPA uses "potentially responsible party" as a term of art and defines it in its publications. *See, e.g.*, EPA MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM, app. III, at 3.

130. *New York v. Shore Realty Co.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 19 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

131. CERCLA provides three statutory defenses to liability: an act of God, an act of war, and an act or omission of a third party who is unconnected with the defendant if the defendant "exercised due care" and "took precautions against foreseeable acts or omissions of the third party . . ." 42 U.S.C.A. § 9607(b) (West 1983). For a discussion of these and other possible defenses see Glass, *Superfund and SARA: Are There Any Defenses Left?* 12 HARV. ENVTL. L. REV. 385 (1988).

132. The definition of "owner or operator" excludes a person "who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C.A. § 9601(20)(A) (West 1983 & Supp. 1990). Most courts have imposed liability on lenders who foreclose and take title to the contaminated site on the theory that the creditor is the owner and no longer holds an ownership interest merely to protect a security interest. *See, e.g.*, *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). *But see* *United States v. Mirabel*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985) (exonerating one lender who was the high bidder at a sheriff's sale, did not "operate" the site, and assigned its interest in the property after a few months).

The earlier cases, *Mirabel* and *Maryland Bank*, suggest that courts were "reluctant" to hold secured creditors liable for the entire cleanup cost, *see* Heidt, *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in Toxic Waste Bankruptcies*, 40 RUTGERS L. REV. 819, 828 n.43 (1988); cases decided since then, however, show an opposite trend. For a discussion of the lender exception and lender liability in general, *see* Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925 (1989); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139 (1988); Comment, *Lender Liability for Hazardous Waste: An Economic and Legal Analysis*, 59 U. COLO. L. REV. 659 (1988); Comment, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 (1987) (all of these pieces were written before the recent cases on the subject).

A recent case, *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *affg*, 724 F. Supp. 573 (D. Md. 1986), *cert. denied*, 111 S. Ct. 752 (1991), involved a creditor who held an interest in both the real estate and personal property (inventory and equipment) of the responsible corporation. The creditor, being cautious, did not foreclose on the real property. The government alleged that the creditor participated in the management of the facility, was outside the exception for secured lenders and therefore liable. The court agreed that there was an issue of fact as to whether the creditor was an "owner or operator" and refused to grant summary judgment for the creditor. The court recognized that secured creditors often "have some involvement in the financial affairs of their debtors" and said that involvement such as monitoring and helping with an occasional financial decision would not expose the secured creditor to liability (*i.e.*, the secured creditor will still be within the secured creditor exception). However, if the secured creditor participates in the "financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes . . .," then it is no longer protected. The court said the secured creditors need not actually participate in the "day-to-day operations" of the site. *Id.* at 1557-58. For a criticism of this view see *infra* note 330. Recently, the Court in *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990) refused to impose liability on the secured creditor finding *Fleet Factors* too broad. Rather it returned to the earlier tests that secured creditors lose their exception only when they participate in the day-to-day operations of the facility. *Id.* at 672.

This CERCLA liability is for 1) the full amount of the cleanup, 2) the full amount of other "response" costs, and 3) damage to natural resources, subject to certain limitations.¹³³ The liability of the shareholders is generally only at issue, however, when the enterprise itself cannot pay the cost of cleanup and its other obligations. Even though a shareholder is within a group that can be held primarily and fully liable under CERCLA, as a matter of practice, that person will be pursued when the corporation itself cannot meet the cost of cleanup. Thus that person is, in the reality of practice, only "secondarily" liable.

B. Shareholder Liability as an Owner or Operator

1. Introduction

The first two categories of persons liable for the cleanup of a site are 1) the current owners or operators of a facility and 2) the owners or operators of the facility at the time of the disposal.¹³⁴ The "facility" is the contaminated site in need of cleanup.¹³⁵ These first two categories have been used most frequently in imposing liability on shareholders. The only distinction between the two is the time at which the person was an "owner" or "operator"—at the time of cleanup or at the time of disposal.

The key question in these cases is whether a particular person is technically an owner or operator. The statute is of little help: "owner or operator" is simply defined as "any person owning or operating" the facility in question.¹³⁶ An ex-

Another recent court refused to hold that a lender was an "operator," although several factors indicated an involvement with the operations of the responsible corporation. The creditor's claim was for \$8.5 million and the court held that the creditor was justified in "keep[ing] informed about the financial status of the Debtor." *In re Corona Plastics, Inc.*, 99 Bankr. 231, 238 (Bankr. D.N.J. 1989).

For some time creditors have had to walk a fine line between having sufficient control over their debtors in order to protect their loans or collateral and becoming so involved so as to run the risk of becoming an "insider" under the Bankruptcy Code—the consequence of which is to extend the preference period from 90 days to 1 year (allowing the trustee to recover an increased amount of payments made by the debtor to the creditor during this time). See 11 U.S.C.A. §§ 101(30)(B)(iii) (West Supp. 1990) and 547(b)(2) (West Supp. 1989). The line the creditors must now walk is more dangerous. Should a creditor foreclose and become an "owner" or become so involved with its debtor so as to lose its secured creditor exception, it can be held responsible for the full cost of cleanup. Shareholders run similar risks.

Finally, lenders may bear a portion of the cleanup cost if the government is given priority to their collateral for cleanup claims. This too has been discussed by several commentators, who vary in their conclusions regarding the wisdom of a government superlien. See Schwenke & Lockett, *Superlien "Solutions" to Hazardous Waste: Bankruptcy Conflicts*, ABA ENVTL. L. 1 (Winter 1983/84); and Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?* 47 WASH. & LEE L. REV. 347 (1990).

133. 42 U.S.C.A. § 9607(a)(4)(C) (West 1983 & Supp. 1990). The liability for resource damages by facilities (with the exception of certain motor vehicles, aircraft and pipelines) is "capped" at \$50 million. 42 U.S.C.A. § 9607(c)(1)(D) (West 1983 & Supp. 1990).

Damages can climb even higher should the responsible party refuse to "properly provide removal or remedial action upon order of the President . . ." in which case punitive damages can be assessed up to three times the total costs paid by Superfund as a result of the failure of the responsible party to act. 42 U.S.C.A. § 9607(c)(3) (West 1983). For additional damage provisions see 42 U.S.C.A. § 9607(c)(2) (West 1983).

134. 42 U.S.C.A. § 9607(a)(1) and (2) (West Supp. 1990). See *supra* notes 122-23.

135. See *supra* note 128. The terms facility and contaminated site are used interchangeably.

136. 42 U.S.C.A. § 9601(20)(A) provides: "'owner or operator' means . . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility."

The lack of clarity in the CERCLA provisions has been commented on by courts and writers alike. See, e.g., *In re Acushnet River*, 675 F. Supp. 22, 25 n.2 (D. Mass. 1987). As a comment on the poor drafting of CERCLA,

ception is provided for anyone who holds indicia of ownership to protect a security interest but who does not participate in the management of the facility.¹³⁷

The language of the statute placing liability on the "owner or operator" of a facility has caused two problems often exacerbated by the courts. First, most courts have treated the phrase "owner or operator" as a single unit, failing to distinguish between the two terms.¹³⁸ The distinction is important. "Owners" are liable by virtue of their ownership alone—an owner need not have participated in the disposal to be liable. Thus, landlords are liable as owners although the tenants contaminated the property and a secured creditor which forecloses and becomes the "owner" of the contaminated property is liable.¹³⁹ "Operator" on the other hand connotes some involvement with the disposal or management of the facility. From a corporate law viewpoint, if the facility is owned by the corporation, a shareholder is not technically an "owner" unless the corporate veil is pierced. A shareholder who actually operates the facility, however, arguably is an "operator." Because the courts have generally treated the term as a unit, this Article will refer to "owner or operator" in order to discuss the cases fully, but the reader should bear in mind that use of the term "operator" alone is often more appropriate when discussing the liability of shareholders under CERCLA. Second, courts have failed to focus on the term "facility." They are often unclear on whether one must be the "owner or operator" of the *corporation* or of the *facility*. While one who operates the corporation may also be the operator of the facility, courts have not taken the time to make the necessary connections and tie their reasoning back to the statutory language.

Courts of appeals of three circuits and over a dozen district courts have considered the question of whether a shareholder can be an "owner or operator" and responsible for the cleanup of a toxic waste site. Courts have devised a number of tests to determine whether a shareholder is liable as an "owner or operator." From these various tests one can compile a list of the factors courts have considered relevant in making the determination. The courts have looked at the degree of the shareholder's:

1. actual participation in the management of the corporation;
2. actual participation in the management of the facility;
3. actual participation in the waste disposal;
4. power to control the management or operations of the corporation;
5. power to control the management or operations of the facility;
6. power to control the waste disposal itself;
7. ability to prevent or abate the disposal or its effect;
8. awareness of the disposal practices;
9. receipt of benefits from the wrongful disposal;

one court asked what a facility might be that is neither onshore nor offshore and suggested it might be one in outer space! *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988).

137. See *supra* note 132.

138. An exception is both the court of appeals and district court in *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *aff'd in part*, 724 F. Supp. 15 (D.R.I. 1989). Both courts were careful to distinguish between shareholder liability as an "owner," which could be imposed only indirectly if the veil were pierced, and as an "operator," which could be imposed directly under CERCLA. See *infra* text accompanying notes 185-86. A few other courts have made the distinction as well, including *Riverside Mkt. Dev. Corp. v. International Bldg. Prod.*, Slip No. 88-5317, 1990 U.S. Dist. Lexis 6375 (E.D. La. May 23, 1990).

139. See *supra* note 132.

10. extent of ownership interest in the responsible corporation.

Although courts have not used these factors in any uniform manner, one can begin to see certain trends in the case law. The list is intended here to help guide the reader through the discussion that follows. This section will begin by discussing and analyzing the three circuit court cases and then go on to fill in some of the gaps by discussing several district court cases.

The first court of appeals case to consider the question of shareholder liability as an owner or operator was *New York v. Shore Realty Corp.*,¹⁴⁰ decided in 1985 and the most recent was *United States v. Kayser-Roth Corp.*,¹⁴¹ decided in August 1990. *Joslyn v. T.L. James & Company*¹⁴² was decided in January 1990 and represents a significant departure from *Shore Realty*, *Kayser-Roth* and most of the district court cases.¹⁴³

2. Circuit Court Cases

In 1985 the Second Circuit decided *New York v. Shore Realty Corp.*¹⁴⁴ An individual, Donald LeoGrande, formed Shore Realty Corporation in order to purchase and develop a parcel of land. Shore Realty Corp. purchased the property knowing that hazardous waste was stored in large, leaking tanks. The hazardous waste had contaminated the site and was seeping and leaking into the groundwater and surrounding harbor.¹⁴⁵ LeoGrande knew of the contamination and presence of the waste and knew the potential cleanup cost.¹⁴⁶ The State of New York incurred costs under CERCLA in evaluating the site and supervising some removal actions.¹⁴⁷

After holding Shore Realty Corp. liable as an owner of the site, the court turned to the question of LeoGrande's personal liability. LeoGrande was the "officer and stockholder" of Shore Realty Corp.¹⁴⁸ The court held LeoGrande liable for two reasons. First, the court looked to the secured lender exception: that one is not an "owner or operator" if one "without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his

140. 759 F.2d 1032 (2d Cir. 1985).

141. 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

142. 893 F.2d 80 (5th Cir. 1990), *aff'g*, 696 F. Supp. 222 (W.D. La. 1988), *cert. denied*, 111 S. Ct. 1017 (1991).

143. In addition, the Eighth Circuit decided *United States v. Northeastern Pharmaceutical and Chemical Co.*, ("NEPACCO"), 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), but it did not have to decide the difficult question of shareholder liability as an owner or operator since the responsible corporation itself neither owned nor operated the facility. *See infra* text accompanying note 212.

144. 759 F.2d 1032 (2d Cir. 1985).

145. *Id.* at 1038-39. Prior to the sale to Shore Realty Corp. the property was owned by a hazardous waste disposal company, which illegally operated a storage facility for toxic wastes at the site. When Shore purchased the property, not only were portions of the land and water contaminated, but there were five 700,000 gallon tanks and six smaller tanks on the property, each of which contained hazardous substances—benzene, dichlorobenzene, ethyl benzene, and PCBs, just to name a few. *Id.* at 1038.

146. Before taking title, Shore Realty Corp. (and LeoGrande) received a full environmental report from its own consulting firm. *Id.* Shore Realty Corp. sought a "waiver . . . of liability" from the appropriate state agency but was refused. Shore Realty Corp. purchased the property nonetheless. *Id.* at 1039.

147. *Id.* at 1042-43.

148. *Id.* at 1037.

security interest in the facility.”¹⁴⁹ The court said that this “implies that an owning stockholder who manages the corporation, such as LeoGrande, is liable under CERCLA as an ‘owner or operator.’”¹⁵⁰ The court’s analysis is based on an exception to the definition of “owner or operator” which applies to one who holds “indicia of ownership” to protect a *security interest*. Although “security interest” is not defined in CERCLA, owning shares in a corporation is not normally considered a “security interest.” For example, the Uniform Commercial Code defines security interest as “an interest in personal property or fixtures which secures payment or performance of an obligation.”¹⁵¹ For the purposes of the Bankruptcy Code, a “security interest” is a “lien created by an agreement,”¹⁵² and a “lien” is a “charge against or interest in property to secure payment of a debt or performance of an obligation.”¹⁵³ A share of stock represents ownership in the corporation; it is not an interest which secures payment or the performance of an obligation. While the secured lender exception arguably shows a Congressional intent to hold a shareholder who manages the facility liable,¹⁵⁴ it is not clear that is the point the court was making in *Shore Realty*. Further, the court in this part referred to LeoGrande’s management of the *corporation*, while the exception for secured lenders refers to participation in the management of the *facility*.¹⁵⁵

The second ground is more convincing. The court said that since LeoGrande was “in charge of the operation of the facility,” he was liable as an “operator” within the meaning of section 9607(a)(1).¹⁵⁶ The key factor here is control over the *facility*, although it is unclear whether the court meant that he exercised control, *i.e.*, he actually participated in the operations or management of the facility, or that he had the power to control the management of the facility. Here the court follows the statute more faithfully since 1) the court focuses on liability as an *operator* and 2) it focuses on the facility, not the corporation.¹⁵⁷

In early 1990 the Fifth Circuit refused to impose liability on shareholders as owners or operators. In *Joslyn Mfg. Corp. v. T.L. James & Co.*,¹⁵⁸ the court considered the shareholder liability question in terms of a parent/subsidiary relationship. The court affirmed the district court’s grant of summary judgment in favor of a parent corporation, which absolved it from liability for the environmental wrongdoing of its subsidiary.¹⁵⁹

149. *Id.* at 1052 (citing 42 U.S.C.A. 9601(20)(A)).

150. *Id.* The key factors here were ownership of the corporation and management of the *corporation*. Although the court initially said in summary that it was holding the shareholder liable as an “operator,” it did not distinguish between the two terms in the rest of its discussion in this segment of the opinion.

151. U.C.C. § 1-201(37) (1978).

152. 11 U.S.C. § 101(45) (1988).

153. 11 U.S.C. § 101(33) (1988).

154. See *infra* text accompanying notes 329-32.

155. In spite of these departures from the statutory provisions, other courts have also based their tests on the so-called “security interest exception.” See, e.g., *United States v. Nicolet*, 712 F. Supp. 1193, 1203 (E.D. Pa. 1989), discussed *infra* text accompanying notes 232-42.

156. 759 F.2d at 1052.

157. 42 U.S.C.A. § 9607(a)(1), set forth *supra* in note 122.

158. 893 F.2d 80 (5th Cir. 1990), *aff’d*, 696 F. Supp. 222 (W.D. La. 1988).

159. The court also declined to pierce the corporate veil. See *supra* text accompanying notes 35-39.

The subsidiary was formed in 1935.¹⁶⁰ The parent corporation, T. L. James & Co., owned a majority and had control over all of the shares of the subsidiary.¹⁶¹ The factors regarding the relationship between the parent and subsidiary are more particularly set out in the lower court opinion, and they indicate that the subsidiary was in some ways or at some times under the control of the parent but also that the subsidiary had control over a large part of its management or operations.¹⁶² For example, the two corporations had several common board members and persons connected with the parent sometimes had control over the subsidiary's board.¹⁶³ Officers were sometimes common to both. The subsidiary observed corporate formalities.¹⁶⁴ In 1950 the subsidiary was sold and it later passed through a number of owners.¹⁶⁵ These various owners incurred liability under CERCLA and sought to impose liability on the parent under Section 9607(a)(2) as one who was an owner or operator at the time of the disposal.

The court refused to impose liability on the parent directly under CERCLA.¹⁶⁶ CERCLA, it said, does not include a parent company in the definition of "owner or operator," and to include the parent would "dramatically alter traditional concepts of corporation law."¹⁶⁷ The court stated that it would respect the corporate rule of limited liability for shareholders absent a direction from Congress that CERCLA liability should extend to parent corporations for the acts of their subsidiaries.¹⁶⁸ The court did not distinguish between the terms "owner" and "operator."

The court, however, misperceived the concept of limited liability. The court said that when a legislature wants to "change the interpretation of a *judicially created concept*, it makes that intent specific."¹⁶⁹ Later the court said "[w]ithout an express Congressional directive to the contrary, *common-law principles of corporation law*, such as limited liability, govern our court's analysis."¹⁷⁰

160. 893 F.2d at 81.

161. *Id.* The two "minority" shareholders owned 40% of the shares but had endorsed those shares to the parent to secure their "unpaid capital subscription." *Id.* at 81.

162. 696 F. Supp. 222, 227-30.

163. Initially five out of seven members of the board of directors of the subsidiary "were in association with" the parent and the other two were the two minority shareholders. *Id.* In 1945, however, only two out of five directors had ties to the parent and in 1947 four out of eight had ties to the parent. *Id.* The board members, however, were employers of the subsidiary and it is possible that the parent had some control over the subsidiary's employees or their placement on the board. T.L. James, the individual, was the president of the subsidiary and was later succeeded by his son. 893 F.2d 80, 81.

164. The subsidiary held shareholders and directors meetings and it "owned its own property and equipment, and maintained its own employees, payrolls, insurance, pension system, and workman's compensation program. Lincoln filed its own tax returns." *Id.* at 82.

165. *Id.*

166. *Id.* at 82-83.

167. *Id.* at 82.

168. *Id.*

169. *Id.* at 83 (emphasis added).

170. *Id.* (emphasis added).

Limited liability is not a common law principle today. It is a concept established by statute (usually state statute).¹⁷¹ *Joslyn* presents additional complications since Louisiana law has a civil law background. However, the court made no reference to that system and spoke in general terms about the origins of limited liability assuming those origins to be part of the common law. Thus, this discussion refers to the development of the concept of limited liability generally in the United States since that is the apparent basis of the court's opinion. The unique points of Louisiana law are set out in the margin.¹⁷²

To analyze fully the court's view of limited liability requires considering whether limited liability was ever a common law principle and whether the corporate statutes of today are consistent with or in derogation of the common law. First, in the United States the corporate form has always been a creature of the legislature and not a part of the common law.¹⁷³ Second, the early corporations were created by a special act of the legislature, since there were no general incorporation laws at the time. These special grants often specified whether the corporate shareholders enjoyed limited liability or not.¹⁷⁴ According to one expert on the subject, no court in New England, where much of the American business corporate law was developed, had to decide whether a shareholder was liable to the corporation's creditors or whether a shareholder enjoyed limited liability when the charter was silent on this point although a few courts did have to decide whether the corporation could "assess" shareholders for amounts the corporation paid to a creditor.¹⁷⁵ When a few courts did not allow shareholders to be assessed, legislatures responded quickly. Initially legislatures enacted laws requiring all corporate charters to provide for *unlimited* liability.¹⁷⁶

171. A few corporations are created by federal statute, such as the Legal Aid Corporation. However, the corporations involved in all of the CERCLA suits were created under state statutes.

172. Louisiana's rule of limited liability was created by statute, just as it was in the other states. Interestingly, the statute was repealed and never replaced but limited liability lived on as part of the state's "customary law" at the relevant times of this case. Louisiana's Constitution and the comments provide that statutes and their interpretations are superior to customary law. Thus, the State of Louisiana argued that its environmental statute patterned after CERCLA must be read to take precedence over the non-statutory customary law of Louisiana of limited liability. See Reply Brief of *Amicus Curiae*, the State of Louisiana, at 4-7 (by Assistant Attorney General William Ridlon). Not only did the Court in *Joslyn* fail to properly identify the origins of limited liability but it simply concluded that the results would be the same under the Louisiana environmental statute as under CERCLA without exploring the fine points of the Louisiana system. 893 F.2d at 83. Further, under a doctrine of interpreting statutes in Louisiana, in construing Louisiana law based on a federal law, courts may look to decisions under the federal law. The State of Louisiana argued that the case law supported a result in favor of liability. Brief of *amicus curiae*, the State of Louisiana at 20-21 and n.19 (by Assistant Attorney General William Ridlon).

173. The United States adopted the view from England that "some positive act of the sovereign was necessary to create corporate statue." J. HURST, *supra* note 9, at 8-9; I. WORMSER, *supra* note 11 at 15, 17. The origin of the corporation is not known with any certainty. See *id.* J. HURST, *supra* note 9, at 6-7. What is clear is that by the time of the Revolution an act of the legislature was needed to create a corporation. See J. HURST, *supra* note 9; I. WORMSER, *supra* note 11.

174. See E. DODD, *supra* note 10, at 373-76. After 1809 an unlimited liability provision was included in each manufacturing corporation's charter. *Id.* at 375-77.

175. E. DODD, *supra* note 10, at 369-73. Dodd, *supra* note 10, at 1356-57.

The common law that may have been in effect in England at the time of the Revolution is of little help. To the extent the courts in England considered the subject, they did so in the context of public utility or nonprofit corporations and those decisions are of limited value to the business corporation as it then developed in the United States. E. DODD, *supra* note 10, at 13-14. See also *id.* at 84-93, 365-73, 387-89; J. HURST, *supra* note 9, at 27-28. See also I. WORMSER, *supra* note 11, at 27.

176. E. DODD, *supra* note 10, at 375-77; Dodd *supra* note 10, at 1361-66.

Later, legislatures were permitted to include limited liability in the special charters they granted.¹⁷⁷ Finally in the mid-1800s, more than fifty years after corporations first began to appear in this country, limited liability became a standard part of corporate law through general incorporation laws enacted by the state legislatures.¹⁷⁸ The American business corporation as we know it with its limited liability feature, is virtually wholly statutory. Thus, what we have is not a question of Congress altering the common law. If Congress "changed" anything it changed modern statutory law which developed almost exclusively from former statutory law.

The court in *Joslyn* incorrectly relied on the proposition that if Congress had wanted to change a common law rule it should have made its intention clear. Absent that clear intention, the "common law" rule of limited liability should prevail. Since statutory law, not common law, is concerned, the question is how to treat the relationship between state statutory law and CERCLA. This relationship is discussed in part IV.¹⁷⁹

Finally, the court in *Joslyn* also relied on language used in a 1986 amendment to the term "owner or operator." An "owner or operator" is defined simply as "any person owning or operating such facility."¹⁸⁰ The new clause provides: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State, or local government, any person who owned, operated *or otherwise controlled* activities at such facility immediately beforehand."¹⁸¹ The court focused on the use of the word "controlled," which did not appear in the preceding definitional clause of owner or operator. Thus, the court said that since a "'control' test" appeared in subsection (iii) and not in (ii) Congress must have meant not to include a "'control' test" within the general definition of "owner or operator" in clause (ii).¹⁸² Apparently the court believed that had such a control test been included in the earlier clause, the statute could be read to impose direct liability on a parent corporation.

There are several problems with this argument. First, the two relevant subsections of this definition were written at different times. Subsection (ii) was enacted in 1980 and subsection (iii) was added in the Senate by floor amendment to SARA in 1986. Further, on the Senate floor Senator Stafford explained that under the original definition a government which acquired property through foreclosure or abandonment would be an "owner or operator." The

177. E. DODD, *supra* note 10, at 377-84; Dodd *supra* note 10, at 1366-71.

178. E. DODD, *supra* note 10, at 384-87 (regarding Mass.). See also, *id.* at 391-436 regarding the decision in other northeastern states. There were some exceptions to this trend. According to Dodd, Connecticut and New Hampshire included limited liability in most charters granted after 1816. *Id.* at 387. These states did not have general incorporation laws until the late 1830s. *Id.* at 387 n.2 (regarding New Hampshire) and 416 (regarding Connecticut).

179. See *infra* text accompanying notes 337-67.

180. 42 U.S.C.A. § 9601(20)(A)(ii) (West Supp. 1990).

181. 42 U.S.C.A. § 9601(20)(A)(iii) (West Supp. 1990) (emphasis added).

182. 893 F.2d at 83.

1986 amendment was intended to eliminate liability in such cases¹⁸³ and to place liability on the person who owned, operated or otherwise controlled the property before it was transferred to the government. As the United States argued in *Joslyn*, the use of the phrase "any person who owned, operated or otherwise controlled" the property can be read to mean that Congress read the then current owner or operator definition of subsections (i) and (ii) to include persons with such control.¹⁸⁴

Further, the court's logic is inconsistent. If one assumes that a control test only applies in subsection (iii) (regarding those who controlled the property before the involuntary transfer) then that means that one who controlled the property in other cases cannot be an owner or operator under the general definitions. The statute would make no sense if the addition of the term "controlled" in subsection (iii) were read to mean that one who has control cannot be an owner or operator under (i) or (ii) because those sections do not include a control test.

Recently, in *United States v. Kayser-Roth Corp.*,¹⁸⁵ the First Circuit held that a parent corporation could be liable as an "operator" directly under CERCLA. The court was careful to distinguish between liability as an "owner" and as an "operator." The court considered whether CERCLA imposed *direct* liability on shareholders as "operators," but unfortunately it did not provide the detailed statutory analysis needed at this time. The court noted that CERCLA imposed liability on shareholders as "owners" only *indirectly* if the corporate veil were pierced.¹⁸⁶

Regarding direct liability as an operator, the court said that the liability provisions of CERCLA place liability on operators as well as owners. From this the court inferred "that a person who is an operator of a facility is not protected from liability by the legal structure of ownership."¹⁸⁷ That is, the corporate form of ownership does not protect one from operator liability. Second, the court said that there was no indication that Congress intended to exclude parent corporations from liability as operators.¹⁸⁸ Next, the court said that other courts had also concluded that a shareholder could be an "operator."¹⁸⁹ However, of the two cases relied on, one case did not involve the liability of a shareholder as an operator. Rather, it involved the liability of the shareholder as an "arranger"

183. 131 CONG. REC. S11619 (Sept. 17, 1985). As further explained by Senator Bentsen: "this covers the situation, . . . where local governments inherit property . . . through foreclosure or whatever . . . , and they would not be determined owner or operators under the provision of this law."

184. Reply Brief for the United States as *Amicus Curiae*, pages 12-14.

185. 910 F.2d 24 (1st Cir. 1990), *aff'g in part*, 724 F. Supp. 15 (D.R.I. 1989).

186. *Id.* at 25. See also *id.* at 26.

187. *Id.* at 26.

188. *Id.*

189. It cited *Idaho v. Bunker Hill*, 635 F. Supp. 665 (D. Idaho 1986), see *infra* text accompanying notes 223-30, and *Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 743-33 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (Here the court was mistaken since the Court of Appeals in *NEPACCO* held the shareholder liable as an arranger, not an operator.). See *infra* text accompanying notes 283-90. The court also referred to *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), regarding the liability of a secured creditor who became involved in the activities of the responsible corporation.

under section 9607(a)(3).¹⁹⁰ Finally, the court distinguished *Joslyn* by saying *Joslyn* was more concerned with "owner" liability than "operator" liability.¹⁹¹ However, this argument is not persuasive since it relies on a distinction that most courts have simply failed to observe—the difference between owner and operator. *Joslyn* expressly considered the question of whether CERCLA imposed liability on shareholders independent of a veil piercing theory.¹⁹² It failed to distinguish between the terms "owner" and "operator" but by considering direct CERCLA liability it implicitly considered the liability of the shareholder/parent as an *operator* since owner liability applies only if the veil is pierced.

These four brief points led the court in *Kayser-Roth* to hold that liability could be imposed directly on a shareholder under CERCLA.

In deciding whether to actually impose this direct liability given the facts, the court in *Kayser-Roth* refused to set out an "exact standard" by which it would judge whether the parent was an operator. It said, however, that ownership alone with its attendant ability to control, was not sufficient to render a shareholder an "operator."¹⁹³ "At a minimum it requires active involvement in the activities of the subsidiary."¹⁹⁴ The court recited the facts as found by the district court which showed that the parent exercised "practical total influence and control" or "pervasive control" over the subsidiary.¹⁹⁵ The specific facts supporting this control were: the parent had total financial control over the subsidiary (including control over the budget, collecting accounts receivable, approval of expenditures over 5,000 dollars, and approval of sale or lease of real estate); government contracts were "funneled" through the parent; the parent installed its personnel in most of the subsidiary's officer and director positions; and the parent had the ability to control the environmental wrongdoing of the subsidiary and prevent the damage.¹⁹⁶

The three appellate cases, *Shore Realty Corp.*, *Joslyn*, and *Kayser-Roth* show the two ends of the spectrum of liability of shareholders under CERCLA. These courts of appeals decided the question of shareholder liability in the context of the paradigm situation: a corporation was both the owner and operator of a facility in need of cleanup. For all practical purposes the shareholder in each case was the sole shareholder of the corporation.¹⁹⁷ In each case there existed some control by the shareholder over the corporation but the extent of such control varied among the cases. The cases reached different conclusions and none provides us with a full well-reasoned opinion.

190. "Our decision is supported by the interpretation given 'operator' by other courts. See, e.g., *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (individual liability under § 9607(a)(3))." 910 F.2d at 26 (emphasis added). Subsection (a)(3) is "arranger" liability, not operator liability.

191. *Id.* at 27.

192. 893 F.2d at 82-83.

193. 910 F.2d at 27.

194. *Id.*

195. *Id.* at 27 (quoting the district court opinion reported at 724 F. Supp. at 18, 22).

196. *Id.* at 27 (quoting the district court opinion at 22).

197. Technically in *Joslyn*, the shareholder controlled the 40% of shares it did not own via a pledge agreement.

Shore Realty was based in part on peculiar reading and application of the secured creditor exception, and is not very persuasive.¹⁹⁸ The other reason given in *Shore Realty* was simply that the shareholder was "in charge of" the facility. While sufficient control by a shareholder over the facility may be enough to impose liability as an operator, it would have been helpful if *Shore Realty* provided a more detailed analysis of its interpretation of the statute and the facts it relied on.

Joslyn, on the other hand, asserts that if a corporation is liable for an act, limited liability protects shareholders from liability for those same acts.

Kayser-Roth provides little in the way of statutory interpretation supporting direct shareholder liability. It does not examine the question in any depth. It does make two important contributions, however. First, the court respects the distinction between the two terms "owner" and "operator" and says that shareholders may be operators although not technically owners. Second, although *Kayser-Roth* did not develop a test for operator liability, it did refer to the district court's reliance on "total practical control" or "pervasive control,"¹⁹⁹ thus providing some guidance with respect to the standard to be applied. The holding in *Joslyn* not only conflicts with that of *Shore Realty* and *Kayser-Roth*, but also with the district court cases that considered the question (except the lower court in *Joslyn* itself), including *Carolawn*, *Staco*, *Bunker Hill*, *Conservation Chemical*, *Nicolet*, the *Kelly* cases, *McGraw Edison Quadion Corp.*, and *Riverside Market* all of which are discussed in the next section.

Taken together, these cases raise questions both of statutory interpretation (specifically the meaning of the term "operator") and of the relationship between state law and CERCLA. These two subjects are discussed in detail in part IV.

3. District Court Cases

a. General Developments

One of the first courts to consider the question of direct shareholder liability under CERCLA was the district court in *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, ["NEPACCO"].²⁰⁰ The district court opinion in this case has been followed, cited, and quoted by many later courts even though the court of appeals reversed the relevant portion of the opinion on factual grounds.²⁰¹ The court of appeals never addressed the test used by the lower court in imposing liability and that test has remained a touchstone for future cases.

198. See *supra* text accompanying notes 144-55.

199. If the phrase "pervasive control" sounds suddenly familiar, it is because it was used by several courts (including the district court in *Kayser-Roth*) in deciding whether to pierce the corporate veil in the CERCLA context. See *supra* text accompanying notes 59-64. As this article was going to print, the District Court of New Jersey decided *Mobay Corp. v. Allied-Signal, Inc.*, 753 F. Supp. 1248 (D.N.J. 1991). The case relied on *Kaiser-Roth* and denied summary judgment to a parent corporation and remanded the case for further proceedings.

200. 579 F. Supp. 823 (W.D. Mo., 1984), *aff'd in part, rev'd in part*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

201. See *infra* text accompanying note 212.

In the early 1970s, the corporation, NEPACCO, manufactured a disinfectant, the by-products of which were extremely hazardous.²⁰² Lee, the plant manager and also a shareholder, made arrangements to dispose of the waste at a nearby farm owned by a third party.²⁰³ In 1971 the waste was buried at the farm.

In 1974 NEPACCO liquidated its assets, paid its creditors and distributed the remainder to the shareholders.²⁰⁴ The EPA, after receiving a tip in 1979, began to investigate the site and took steps to contain the waste and limit the resulting damage. The EPA sued NEPACCO, Lee, and several others²⁰⁵ under the Resource Conservation and Recovery Act (RCRA).²⁰⁶ When Congress enacted CERCLA in 1980 the EPA amended its complaint to include claims based on the new statute.²⁰⁷

The district court held that the corporate entity, NEPACCO, made the disposal arrangements and that it was liable under both sections 9607(a)(1) and (a)(3), *i.e.*, as an "owner or operator" of the facility and as one who arranged for the disposal.²⁰⁸ Lee was also held to be an owner or operator.

The portion of the opinion most often referred to by other courts is the test that the court applied to Lee. The district court said one "who owns an interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste."²⁰⁹ Lee was a vice president, in charge of the plant at which the hazardous substances were generated, was a "major" shareholder, actively participated in the management of NEPACCO, had the ability to control the waste disposal, the "power to direct the negotiations" regarding the disposal at the farm, and had the "capacity to prevent and abate the damage"²¹⁰ Therefore, the lower court imposed liability on Lee as "both an owner and operator of the NEPACCO plant."²¹¹

202. 810 F.2d at 729-30.

203. 810 F.2d at 730. Lee also approved the services of the disposers. *Id.*

204. *Id.* at 729.

205. The EPA included Michaels, the president and majority shareholder, and Mills, the plant superintendent and one of the persons who actually disposed of the waste, in the suit. Although held liable by the district court as a person who accepted hazardous waste for disposal, § (9607)(a)(4), Mills did not appeal.

206. 42 U.S.C.A. §§ 6901 to 6992 (West 1983 & Supp. 1990).

207. Since CERCLA was enacted after the acts which gave rise to the claim took place, the court addressed the question of whether CERCLA application was retroactive. The circuit court concluded that Congress intended CERCLA to be applied retroactively. 810 F.2d at 732-33. This retroactive application withstood a due process challenge from the defendants since the cleanup of sites "is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole." *Id.* at 734.

The court also held that the government could recover the costs spent prior to the enactment of CERCLA. *Id.* at 734-37. (Relying on *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985)).

208. 579 F. Supp. at 847. The court's discussion of NEPACCO's corporate liability is short. It does not even refer to NEPACCO as an owner or operator; it simply refers to §§ 9607(a)(1) and (a)(3).

209. *Id.* at 849.

210. *Id.*

211. *Id.* at 848. During this time Edwin Michaels was the president of the corporation and the largest shareholder. There is no indication that Michaels knew about or was involved with the disposal, but he had substantial control over the operations of NEPACCO as its major shareholder and president. *Id.* at 845. Although Michaels had no actual knowledge of the disposal activities, he knew the dangers of the hazardous waste the company was producing, he founded the operation at the plant in question, he was a "major" stockholder and as president he had the "capacity and general responsibility" to control the disposal, the "power to direct the negotiations con-

The circuit court reversed the liability imposed as an owner or operator since the "facility" was the farm and it was owned and operated by an unrelated third party,²¹² but the appellate court did not comment on the appropriateness of the test used by the district court.²¹³ Later courts have relied on the tests used by the district court both before and after the court of appeals decision.

The next case to consider the subject was *United States v. Carolawn Company*.²¹⁴ The court refused to grant judgment on the pleadings to three persons who were shareholders and officers of the responsible corporation.²¹⁵ The court quoted *NEPACCO*²¹⁶ and held that a person who had control over a facility or who "participates in the management" of the facility releasing the toxic waste could be liable as an owner or operator.²¹⁷ The corporate character of the enterprise was no defense to the individual defendants. The court did not distinguish between the terms "owner" and "operator."²¹⁸ The court did, however, focus on the management of the facility (as required by the language of the statute) rather than the more general management of the corporation.

In *United States v. Conservation Chemical Company*²¹⁹ the district court considered the liability of a majority shareholder who was also the president, had initially been the sole technical person at the facility, and later made all

cerning the disposal" at the farm and "the capacity to prevent and abate the damage caused by the disposal" *Id.* at 849. Thus, Michaels also was held liable as an "owner and operator" of the NEPACCO plant. *Id.*

212. 810 F.2d at 742-43 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). The court of appeals did impose liability on one of the shareholders as an arranger. See *infra* text accompanying notes 284-91.

213. The court of appeals did impose liability on both Lee and also the majority shareholder, Michaels, who was less involved, under RCRA as persons who "contributed" to the disposal of toxic waste that created an "imminent and substantial endangerment to health or the environment." Although the shareholder/president (Michaels) was not involved in the planning or arranging he was in control of the corporation and was "in charge of and directly responsible for all of" the corporate operations and "had the ultimate authority to control the disposal of NEPACCO's hazardous substances." Thus, the very fact of control, even if not exercised, placed this majority shareholder/president in a position of liability. This position of control has become a factor in determining liability in later cases, both under CERCLA and RCRA. Although the circuit court had to absolve Lee and Michaels from liability as owners or operators since the farm was owned by an unrelated party, the court was very focused on the factor of "control," in the context of RCRA liability. Had the waste been deposited on NEPACCO property, Michaels, as a person in control of the site or the corporation, and Lee, as the person in control of the disposal and possibly of the site, may well have been considered "operators."

The other issue in *NEPACCO* is of some significance. In *NEPACCO* the corporation had dissolved and had distributed all of its assets to creditors and shareholders five years prior to any action regarding the cleanup of a site contaminated with toxic waste by the enterprise. The statute of limitations for any claims against the corporation would normally have long since run had the corporation properly dissolved. In the *NEPACCO* case, however, the corporation had never actually dissolved and suit could still be brought against it. See Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131 (1989) for a discussion of the liability of corporations post dissolution for CERCLA claims and specifically whether CERCLA preempts state corporate law to allow liability.

The fact that NEPACCO itself could still be sued is of little practical consequence if it has no assets and "reviving" the corporation does not lead to the imposition of liability on others, such as the shareholders. Generally, shareholder liability following a proper corporate dissolution is very limited.

214. 14 Envtl. L. Rep. 20,699 (D.S.C., June 15, 1984).

215. In this case the three owners of the corporation had also actually had title to the contaminated property for a brief period. The court, however, was clear that liability might be imposed not only due to that period of ownership, but also due to the roles and acts of the three in the corporation.

216. It quoted the phrase set forth at text accompanying note 209.

217. 14 Envtl. L. Rep. at 20,700.

218. *Id.*

219. 619 F. Supp. 162 (W.D. Mo. 1985)

decisions about the projects the company would be involved in. He "was primarily responsible for environmental controls" at the site and was involved in the day-to-day operations of the facility.²²⁰ The court held that he might be liable as a current owner (under section 9607(a)(1)) or as one who owned or operated a facility at the time of disposal (under section 9607(a)(2)).²²¹ The court refused to grant summary judgment against the individual, however. The court reviewed the earlier decisions of *Shore Realty* and *Carolawn* and relied on the district court's test in *NEPACCO*.²²² In *Conservation Chemical*, the liability suggested as a current owner is inappropriate since the corporation owned the site. The individual was actively involved in the management of the site at the time of the disposal,²²³ and liability is therefore appropriate as an operator under section 9607(a)(2). The court also correctly focused on the individual's activities at the facility rather than the corporation.

In *Idaho v. Bunker Hill Co.*,²²⁴ the facts showed a close relationship between parent and subsidiary. The parent's consent was required before expenditures of 500 dollars or more could be made by the subsidiary for pollution matters, the parent controlled a majority of the board of directors at various times, and the subsidiary was wholly owned by the parent.²²⁵ The court reviewed the statutory language of "owner or operator" liability and at first summarily concluded that due to the level of the parent's participation in the management of the subsidiary, the parent was an "owner or operator."²²⁶ Next, the court relied on the district court's test in *NEPACCO*.²²⁷ The court in *Bunker Hill* went on to say that the parent could be liable for the acts of its subsidiary since the parent: (1) was both in a "position to be, and was, intimately familiar with hazardous waste disposal and releases" at the subsidiary; (2) had the authority to control the disposal, and (3) had the power to make decisions to "prevent and abate the damage caused by the disposal."²²⁸ The court also looked at the Congressional intent to impose the burdens of toxic waste disposal on those who had reaped the gains for the disposal.²²⁹ Here, the parent had substantial gains in the form of dividends from the act of the subsidiary in disposing of the toxic waste. The parent received some 27,000,000 dollars in dividends from the subsidiary while the authorized capital of the subsidiary was only 1100 dollars.²³⁰ The court concluded that these factors were sufficient to make the parent an "owner or operator" of the subsidiary.²³¹ The court did not distinguish between the two terms "owner" and "operator."

220. *Id.* at 187.

221. *Id.* at 190.

222. See *supra* text accompanying note 208.

223. 619 F. Supp. at 190.

224. 635 F. Supp. 665 (D. Idaho 1986).

225. *Id.*

226. *Id.* at 671.

227. See *supra* text accompanying note 209.

228. 635 F. Supp. 665, 672 (D. Idaho 1986).

229. *Id.* at 671-72 (citing the district court opinion in *NEPACCO*, 579 F. Supp. at 848-49). See also, *infra* note 325 regarding this aspect of Congress' intent.

230. *Id.*

231. *Id.*

In *United States v. Nicolet*,²³² the government asserted three theories upon which the sole shareholder/parent could be held liable directly as a former owner or operator of the contaminated site under section 9607(a)(2). Two of those theories are relevant here.

First, the parent was the sole shareholder of the subsidiary and had "actively participated in the management while" the improper disposal was occurring.²³³ The court agreed with the government that this was sufficient to state a cause of action against the parent or shareholder as an owner or operator. Unfortunately, the court's reasoning and also its holding are less than clear. The court did not specify whether participation in the management of the corporation or the contaminated site was important, but implied that management of the corporation was the important factor.²³⁴ The court also followed a case concerning lender liability,²³⁵ which explained the security interest exception and, like *Shore Realty*, implied from this exception for secured lenders that shareholders who participate in management can be liable.²³⁶ The court also failed to distinguish between the two terms "owner" and "operator." However, as decided, the case, like several others,²³⁷ makes the combination of corporate ownership and active participation in management of the responsible corporation a deadly combination when it comes to shareholder liability.

Second, the parent was familiar with the disposal practices of the subsidiary, it could control the disposal and the releases, it could have abated the effect of the disposal, and it benefited from the "disposal practice."²³⁸ The court again agreed with the government that this created a cause of action against the parent as a former owner or operator under section 9607(a)(2).²³⁹ The court relied on *Bunker Hill*, saying that there the court imposed liability on a parent corporation under similar circumstances when the parent participated in the management of the subsidiary.²⁴⁰ The *Nicolet* court focused on the portion of *Bunker Hill* which in turn relied on the district court's test in *NEPACCO*.²⁴¹ The court failed to distinguish between participation in the management of the subsidiary and the management of the facility. Finally, at most, the parent should have

232. 712 F. Supp. 1193 (E.D. Pa. 1989).

233. *Id.* at 1203.

234. The section of the opinion is headed "Stockholder and Direct Participation in Management of Ambler Site." *Id.* at 1203. Yet in the section summarizing its position, the court says that "a corporation which holds stock in another corporation (e.g., a subsidiary) and actively participates in its management can be held liable for cleanup costs . . ." *Id.* (emphasis added).

235. *United States v. Mirabile*, 15 Env'tl. L. Rep. 20,994 (E.D. Pa., 1985).

236. 712 F. Supp. at 1203. The court also relied on *Kelly v. Arco Indus. Corp.*, 723 F. Supp. 1214 (W.D. Mich. 1989), but quoted that portion of the opinion that paraphrases CERCLA.

237. See the discussions of *Shore Realty*, *supra* text accompanying notes 144-57; *Carolawn*, *supra* text and accompanying notes 214-18.

238. 712 F. Supp. 1193, 1203-04. (E.D. Pa. 1989).

239. *Id.*

240. *Id.* at 1204. For a more complete discussion of *Bunker Hill*, see *supra* text accompanying notes 224-31.

241. See *supra* text accompanying note 209. The court of appeals had ruled on *NEPACCO* well before *Nicolet* was decided, which was not noted by the court in *Nicolet*. However, the district court opinion has some continuing vitality. See *supra* text accompanying notes 199-213 and also note 213.

been deemed an "operator" not an "owner," absent piercing the corporate veil.²⁴²

*Vermont v. Staco*²⁴³ also involved the liability of corporate shareholders. Staco, Inc. had produced mercury thermometers. It contaminated land on which its plant was located. The land was owned by Keeper Corporation. The plant was closed in 1984.²⁴⁴ Both corporations were wholly owned subsidiaries of Chase Instruments Corporation.²⁴⁵ The court granted the state's motion for summary judgment and held both subsidiaries and the parent liable as under section 9607(a)(1) without specifying which was an "owner" and which was an "operator."²⁴⁶

Two individual stockholders of the parent corporation (one the majority shareholder) held the positions of president of the parent and the chairman of the board of directors of the parent.²⁴⁷ The court found that via their positions they "participated in the control and management of Staco."²⁴⁸ Another individual defendant was the person who managed "the operations of the Staco's plant." All three individuals "participated in the management and control of Staco's operations . . ."²⁴⁹ The court said that all three individuals "as owning and managing stockholders, are personally liable in their respective executive capacities in the corporate structure."²⁵⁰ If the court meant that each was so involved so as to be an "operator" then liability is consistent with the statutory language.²⁵¹

In *United States v. McGraw Edison Co.*,²⁵² the defendant corporation owned only 49 percent of the corporation responsible for the disposal of the hazardous waste. The parent filed a motion for summary judgment arguing that it could not be held liable since it was a minority shareholder,²⁵³ and thus not an owner or operator under CERCLA. The shareholder argued that the only way to impose liability on it was to pierce the corporate veil, which the facts did not support. The government alleged that this shareholder had, together with the majority shareholder, participated in the operations of the subsidiary re-

242. In addition, the parent held a mortgage on the property owned by the subsidiary. The parent was potentially liable as a mortgage holder if it participates in the operations of the site. See *supra* note 132 for a discussion of lender liability when a lender forecloses on a mortgage.

243. 684 F. Supp. 822 (S.D. Vt. 1988).

244. *Id.* at 825, 831.

245. *Id.* at 831.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 832.

251. The court is not clear whether it focused on the control the individuals had over the parent or over Staco and its plant operations. Staco was the operator of the site. The parent was also arguably an operator according to the court. (The court did not specify whether the parent's liability was as an owner or operator. Operator liability is more appropriate since yet another subsidiary owned the site). If the focus was on the operation of the parent, the individuals were at most operators of an operator of an operator. If the focus was on their management of the plant, they were correctly considered "operators" of the facility within the meaning of CERCLA.

Finally, one individual was not a stockholder at all and thus the court's characterization is incorrect.

252. 718 F. Supp. 154 (W.D.N.Y. 1989).

253. *Id.* at 156.

sponsible for the toxic waste disposal.²⁵⁴ It argued that the case law supported imposing liability on a shareholder who participated in the management of a responsible corporation.²⁵⁵ More specifically, the government maintained that the majority and minority shareholders had agreed that the minority shareholder would give certain technical advice to the corporation. There was evidence that one person served as a corporate officer for both the minority stockholder and the responsible corporation. The court relied on the lower court opinion in *NEPACCO* that held that one who owns "an interest in and who is actively participating in its management can be held liable for the disposal of hazardous waste."²⁵⁶ The court did not discuss the obvious distinction between the two cases: *NEPACCO* involved a majority shareholder, this case did not. Like earlier cases, the court also failed to recognize that this particular portion of *NEPACCO* was drawn into question since neither *NEPACCO* nor its shareholders were technically owners or operators because the facility was owned by a third party. The court did not discuss whether the shareholder's liability was as an owner or as an operator. The court referred to the shareholder participation in the corporate activities without relating those activities to the facility in order to establish liability under the statute. Since the facts were sufficiently in dispute the court deferred its decision until further discovery had taken place.²⁵⁷

The principal shareholder/president who had responsibility for the management of the corporation which disposed improperly of hazardous substances was held liable as an "operator" in *International Clinical Laboratories, Inc. v. Stevens*.²⁵⁸

Another recent case provides a clear look at the statutory requirements and also provides some guidelines as to who is and is not an "operator." In *Riverside Market Dev. Corp. v. International Bldg. Prods.*,²⁵⁹ the court considered the potential liability of a former corporate owner of a facility and its two shareholders/officers. First, the court noted that neither shareholder could be an "owner" and that liability could only be imposed as an "operator." The court mistakenly referred to the secured creditor exception to the definition of "owner or operator," but developed a test similar to several other courts to determine operator status. The court said it would look at the "degree of participation in the operations of the . . . facility."²⁶⁰ The majority shareholder owned 85 percent of the stock, was chairperson of the board and was the principal source of money. However, he was minimally involved in the operations at the facility and the court granted summary judgment in his favor. The other shareholder owned 15 percent of the stock, was president, spent some of his time at the facility and was involved with its operations, although the facts were not yet fully developed to his participation. The court denied his motion for summary judgment since a

254. *Id.* at 157.

255. *Id.*

256. *Id.*

257. *Id.* at 157-58.

258. 710 F. Supp. 446, 471 (E.D.N.Y. 1990).

259. *Riverside Mkt. Dev. Corp. v. International Bldg. Prods.*, Slip. Op. No. 88-5317 (all references will be made to Lexis page numbers) (E.D. La. May 23, 1990), 1990 U.S. Dist. Lexis 6375.

260. *Id.* at 5.

genuine issue of material fact existed. Although the distinction drawn between the two shareholders is supported by the statute, a different test should apply to the passive but controlling shareholder other than actual participation in the management of the facility.²⁶¹ Interestingly, the court was within the Fifth Circuit, where *Joslyn* reigns. The court distinguished *Joslyn* primarily because this case involved individual shareholders who were also officers while *Joslyn* involved a parent/subsidiary relationship.²⁶²

b. *The Power to Prevent Harm: A New Standard Emerges*

A notable new standard in shareholder liability was announced in three cases decided by the same court. Two of the cases are related, both called *Kelley v. Thomas Solvent Co.*,²⁶³ and the third case is *Kelley v. Arco Industries Corp.*²⁶⁴ The court was concerned about imposing liability on corporate shareholders and officers and noted the failure of earlier courts to devise an "explicit standard of liability" for such persons. The court set out to establish such an explicit standard.²⁶⁵

In *Arco Industries*, the defendant Ferguson was a shareholder owning less than 5 percent of the outstanding shares.²⁶⁶ Ferguson was at various times the president, chief operating officer, and a director; he reported directly to the chief executive officer; at times, various managers of the plant reported to him; he regularly toured the manufacturing areas of the plant; and he was involved in setting disposal policies and other pollution-related activities.²⁶⁷ The other defendant, Matthaei, was the majority stockholder of Arco Industries; he had "authority to elect the board of directors."²⁶⁸ Matthaei had limited contact with the actual day to day operations of the contaminated site.

Both *Thomas Solvent* cases involved individuals who were shareholders and occupied various positions in two related companies, Thomas Solvent Company and Thomas Development Company. These two companies were responsible for the pollution of several toxic waste sites. *Thomas Solvent I* involved the liability of the two related companies and Richard Thomas. Richard Thomas was the president of both corporations; he was a shareholder of Thomas Development Company and also its secretary and director; he was a director of Thomas Solvent Company and through a living trust established by him, he was

261. See *infra* text accompanying notes 377-80.

262. 1990 U.S. Dist. Lexis at 9-10.

263. *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. Mich. 1989) ("Thomas Solvent I"), and *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554 (W.D. Mich. 1989) ("Thomas Solvent II").

264. 723 F. Supp. 1214 (W.D. Mich. 1989). This opinion involved a motion to clarify an earlier order of the court which had refused to dismiss the action against the defendants.

The *Arco* case was recently settled and the court approved a consent decree that requires the defendants, primarily the corporate defendant, to clean up the site in question and set up a trust fund from which it will reimburse the government and pay for the costs of cleanup. Civil penalties and attorneys fees were also agreed to. For a summary of the settlement provisions see 4 Toxics L. Rep. 741 (Nov. 22, 1989).

265. 723 F. Supp. at 1216.

266. *Id.*

267. *Id.*

268. *Id.* at 1217.

its sole shareholder.²⁶⁹ In *Thomas Solvent II*, Letha Thomas (Richard's mother) was a director and secretary of Thomas Solvent Company, a shareholder of Thomas Development, and, at times, the president of Thomas Development.²⁷⁰ With respect to the liability of these individuals, the court's opinion is identical word for word in all three opinions—*Arco Industries*, *Thomas Solvent I*, and *Thomas Solvent II*.²⁷¹

In each case, the court reviewed the earlier cases concerning the liability of individuals for corporate wrongs.²⁷² The court focused on the one factor that appeared over and over in those earlier cases: control or the ability to control the corporate acts.²⁷³ The court concluded that where CERCLA liability is concerned, an individual may be held responsible for hazardous waste disposal even though traditional corporate doctrines, such as piercing the corporate veil, do not apply.²⁷⁴

The court devised what it called the "prevention test:" liability can be imposed on one as an owner or operator if that individual in the close corporation could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim.²⁷⁵ The court attempted to set out specific factors it would consider in determining responsibility under this test. Two types of factors can be found in the court's decision.²⁷⁶ The first is the individual's power or

269. To discover all of these facts one needs to refer also to *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1448 (W.D. Mich. 1988), yet another case concerning these companies. That case involved, among other things, fraudulent conveyances made between various related companies.

270. 727 F. Supp. at 1563.

271. In fact the court says explicitly in *Thomas Solvent I* that it is adopting its decision in *Arco Industries*. *Thomas Solvent I*, 727 F. Supp. at 1541.

272. Specifically, the court reviewed the circuit court opinion in *NEPACCO*, 810 F.2d 726, discussed *supra* text accompanying notes 206, 211 and *infra* notes 283-90; *Shore Realty*, 759 F.2d 1032, discussed *supra* text accompanying notes 144-57; *Vermont v. Staco*, 645 F. Supp. 822, discussed *supra* text accompanying notes 243-51; *United States v. Ward*, 618 F. Supp. 884, discussed *infra* text accompanying notes 298-302; *United States v. Carolawn*, 14 Env'tl. L. Rep. 20,699, discussed *supra* text accompanying notes 213-17, and *Idaho v. Bunker Hill*, 635 F. Supp. 665 (D. Idaho 1986), discussed *supra* text and accompanying notes 223-30.

273. *Thomas Solvent I*, 727 F. Supp. at 1542-43; *Thomas Solvent II*, 727 F. Supp. at 1561-62; *Arco Industries*, 723 F. Supp. at 1218-19.

274. *Thomas Solvent I*, 727 F. Supp. at 1543; *Thomas Solvent II*, 727 F. Supp. at 1561-62; *Arco Industries*, 723 F. Supp. at 1219.

275. *Thomas Solvent I*, 727 F. Supp. at 1544; *Thomas Solvent II*, 727 F. Supp. at 1561-62; *Arco Industries*, 723 F. Supp. at 1219.

276. The court refers to factors it will consider three times using three separate sets of terms. The first time, the court states that it will consider "the corporate individual's degree of authority in general and specific responsibility for health and safety practices, including hazardous waste disposal." *Thomas Solvent I*, 727 F. Supp. at 1543; *Thomas Solvent II*, 727 F. Supp. at 1561; *Arco Industries*, 723 F. Supp. at 1219.

The second time:

... evidence of an individual's authority to control, among other things, waste handling practices—evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned. Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal. Besides responsibility neglected, it is important to look at the positive efforts of one who took clear measures to avoid or abate the hazardous waste damage. Therefore, the Court will look to this evidence when determining liability by the "prevention" test.

Thomas Solvent I, 727 F. Supp. at 1543-44; *Thomas Solvent II*, 727 F. Supp. at 1562; *Arco Industries*, 723 F. Supp. at 1219-20.

authority to control the disposal of the hazardous waste. In this respect the person's position in a corporation is important. A person with the authority to control all corporate matters, such as a sole shareholder, would have the type of power described here. The second factor is the individual's responsibility for the waste disposal itself. In this context, a person may lack power over the corporation but be responsible due to the responsibility of his or her particular job. The court is not clear on whether both factors must be present to impose liability. Most revealing is perhaps the court's statement that "weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices. . . ."²⁷⁷ This seems to indicate the court must consider both factors. It does not necessarily mean that the shareholder must meet both criteria (power over and actual responsibility for waste disposal) especially since after discussing these factors, the court reiterates that the focus of the inquiry is on whether the defendant could have prevented or significantly abated the release of hazardous substances.²⁷⁸ Thus, the factors are indicators of persons who might be in a position to prevent the harm. The court does not say whether such persons are "owners" or "operators." This test was followed recently in *Quaddon Corp. v. Mache*,²⁷⁹ when the court refused to grant a shareholder's motion to dismiss. Although the focus of this discussion is not economic, one cannot help noticing that this test furthers economic efficiency in the cleanup of sites contaminated with toxic substances and provides incentives for proper disposal in the future by placing the costs on those who can most easily or cheaply avoid them.²⁸⁰ Specifically, placing liability on shareholders who are in a position to

Finally, the court notes that its focus is different from both the veil piercing standards and the corporate actor rule. The court will analyze the "power or authority" of the individual, "a factor not used in traditional standards for tortious conduct by corporate individuals." Further it "will look at responsibility undertaken for waste disposal practices as it relates to the prevention test." *Thomas Solvent I*, 727 F. Supp. at 1544; *Thomas Solvent II*, 727 F. Supp. at 1562; *Arco Industries*, 723 F. Supp. at 1220.

277. *Thomas Solvent I*, 727 F. Supp. at 1544.

278. *Thomas Solvent I*, 727 F. Supp. at 1545; *Thomas Solvent II*, 727 F. Supp. at 1562; *Arco Industries*, 723 F. Supp. at 1220.

279. 738 F. Supp. 270 (N.D. Ill. 1990). This court too failed to distinguish between the term "owner" and "operator."

280. One method of determining how to optimally allocate accident costs, is to place the costs on one who can most cheaply avoid the accident, i.e., on the "cheapest cost avoider." G. CALABRESI, *THE COSTS OF ACCIDENTS* 135-39 (1970). If there were no transaction costs, the market would allocate costs of accidents on the appropriate persons to the appropriate degree. *Id.* at 135; see also *id.* at 69 and 134 n.3, referring to the Coase Theorem. The market approach may not work because of transaction costs, imperfect information or other factors. There are, however, persons who can better or more cheaply avoid accidents and the costs should be placed on them. In most cases the polluting corporation itself will be the cheapest cost avoider. The question then becomes: who is the cheapest cost avoider if we know that the corporation itself is not a candidate since it cannot pay its liabilities.

Dean Calabresi sets up three "guidelines" for identifying the cheapest cost avoider: 1) avoidance of high administrative costs; 2) avoidance of externalization of costs; and 3) finding those who can be most easily (cheaply) be convinced to avoid the accident. *Id.* at 142-52. Dean Calabresi calls the latter the "best briber" guideline. *Id.* at 135, 150-52. But he makes it clear this is not meant to have any negative connotation, rather he means a "legitimate inducement." *Id.* at 135 n.2.

Avoiding high administrative costs means that if the administrative costs of finding the cheapest cost avoider are very high it may be cheaper and more desirable to place the costs on one who is not the cheapest cost avoider but who can be found at a lower cost, thus resulting in a net gain to society (an "efficient result"). *Id.* at 143-44. In the toxic waste context, once we have identified the responsible corporation, it will not be difficult to identify its principals, agents and shareholders in most cases. Thus, the administrative expense guideline is not a bar to considering shareholders to be cheapest cost avoiders.

prevent the harm provides an incentive to them to direct proper disposal. This proper disposal will be paid for initially by the corporation and eventually passed on to the consumers (assuming an efficient market). This results in the internalization of costs and ultimately supports efficiency.²⁸¹

4. *Summary of Decisions Regarding Liability as an "Owner or Operator"*

Over a dozen cases have grappled with the question of whether a shareholder is an "owner" or "operator." No single test has been imposed by those courts but an important factor to most of the courts was the shareholder's control over the corporation, the facilities or the waste disposal. This trend has culminated in the "prevention test" just discussed. The final part of this article discusses the appropriateness of these tests and other tests in considering shareholder liability.²⁸²

In spite of the number of cases concerning the liability of shareholders as "owners or operators" courts continue to fail to pay sufficient attention to the language of the statute. The lower court in *NEPACCO* was careless in holding the corporation and its shareholders liable as an owner when the site was owned by an unrelated third party. More than half of the courts have been careless in

Avoiding externalization of costs means internalizing costs. Internalizing costs will result in the production and sale of an optimal amount of a product. See, e.g., A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 86-88 (1983); G. STIGLER, THE THEORY OF PRICE 110-11 (1966). This is perceived to create efficient results and therefore be desirable in a market economy. To internalize costs means that all of the costs of making a particular product are reflected in its price, not only the costs of raw materials but also the social costs such as compensation for injuries sustained to victims as a result of the product. See POLINSKY, *supra* at 111; STIGLER *supra* at 111. Arguably, if all the social costs are included in the product price, individuals operating in the free market will set the optimal level of a particular activity. CALABRESI, *supra* at 69-70.

So, for example, if a choice would mean that taxpayers would pay for the cost of the accident, then that choice should be excluded. *Id.* at 144. In the toxic waste situation, if the responsible corporation or other responsible person does not pay for the cleanup, Superfund will pay for it. Superfund is funded through general tax revenues, taxes on corporations generally and taxes on those industries perceived to be associated with hazardous waste — the chemical industry and the petroleum industry, for example. See *supra* note 114. Each of these sources of funding will cause some level of externalization. To the extent the cost is placed on the taxpayer generally, that portion of the cost is completely externalized. Similarly, to the extent the tax is placed on corporations generally, there is a large degree of externalization since some corporations may be completely unrelated to the toxic waste industry and others may be only distantly related. Even in the case of the tax on industries related to or part of the hazardous waste industry, the taxes will still cause some externalization since these taxes are not specific to the level of pollution for which each member of the industry is responsible. This form of externalization is caused by the failure of "insufficient subcategorization," that is, the inability to efficiently determine exactly who is causing which costs, and to precisely what extent. CALABRESI, *supra* at 145-47.

However, if the costs are placed upon the shareholders, there is an incentive created for shareholders to avoid this improper disposal and place the cost of avoidance on the corporation itself — exactly where it should be placed in order to internalize costs.

Finally, we can ascertain who the cheapest cost avoider is by considering who can be convinced most easily or cheaply to avoid the "accident." In the hazardous substance context the shareholders can be fairly easily convinced or "bribed" into avoiding the accident in order to avoid personal liability. Thus, the shareholder does appear to be a possible cheapest cost avoider although others who make decisions for the corporation, such as officers, may also fit the role.

Part of the foregoing discussion grew out of a conversation with Professor Francis McGovern regarding the *Kelley* cases just discussed in the text.

281. See POLINSKY, *supra* note 280 and STIGLER, *supra* note 280.

282. See *infra* Part IV.A.3.

their use of the terms "owner" and "operator."²⁸³ Failure to make these distinctions can lead to imposition of liability on shareholders whenever the corporations they own are responsible under CERCLA since "owners" are responsible without regard to their involvement with or participation in the business. A shareholder of a corporation which owns the facility, is not an "owner" of the facility—unless the corporate veil is pierced. A shareholder may be an "operator," however, depending on its level of involvement and the test adopted. Courts have also failed to focus on the language of the statute that imposes liability on the owners or operators of a facility and have failed to tie management of the corporation to the operation of the facility.

C. Liability Under Sections 9607(a)(3) and (a)(4) for Arranging the Disposal of or Transporting the Hazardous Waste

Beyond liability as an owner or operator, a shareholder may also be liable under section 9607(a)(3) if the shareholder arranged for the disposal of the hazardous substance. This was the basis upon which the circuit court imposed liability on one of the individual defendants in the *NEPACCO* case.²⁸⁴ Recall that Lee, the vice president and shareholder had approved of a farm as a disposal site and had authorized the services of two persons as disposers. Section 9607(a)(3) imposes liability on "any person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity at any facility . . ."²⁸⁵ Lee first argued that he personally did not own or possess the substances, rather the corporation did. Lee had authority to control the hazardous substance and in his position as plant supervisor, he had direct responsibility for and "immediate supervision" of actually arranging the disposal at the farm.²⁸⁶ In the court's view, this control made Lee one who "possessed" the waste within the meaning of the statute.²⁸⁷ However, this discussion of possession of the waste was unnecessary. The language of section 9607(a)(3) does not require that the hazardous substance be owned or possessed by the one upon whom liability is being asserted. Rather it imposes liability upon anyone who arranged for the disposal of toxic waste owned or possessed by the arranger or "by any other person or entity."²⁸⁸

Lee's main argument was that he merely carried out his corporate responsibility and could not be held personally liable. The court rejected this argument and imposed liability on Lee through a combination of section 9607(a)(3) and

283. Specifically: *Joslyn*, *Conservation Chemical*, *Carolawn*, *Bunker Hill*, *Staco*, the *Kelley* cases, *Nicolet* and *Quadion Corp.*

284. 810 F.2d 726, 744 (8th Cir. 1986).

285. 42 U.S.C.A. § 9607(a)(3) (West Supp. 1990).

286. 810 F.2d at 743.

287. *Id.* at 743-44.

288. This section imposes liability on: "any person . . . who arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other person or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances (emphasis added)."

Taken apart, this section has four requirements: 1) a person must have arranged for the disposal or treatment 2) of a hazardous substance owned by him or any other person or entity 3) the arrangement was for disposal (or treatment) at a facility owned or operated by another party or entity and 4) the substances were disposed of (or treated) at that facility. The lower court seems to have read this section correctly. See 579 F. Supp. at 847.

the corporate actor rule.²⁸⁹ First, the court said Lee was liable because he “personally arranged for the transportation and disposal of hazardous substances” for the corporation and had thereby participated in the violations of CERCLA.²⁹⁰ His liability was personal, “not derivative.”²⁹¹ The court then went on to cite a line of cases imposing liability on corporate officers for their tortious acts, *i.e.*, the corporate actor rule.

The activities of NEPACCO and its shareholders and officers also gave rise to another case, *United States v. Bliss*.²⁹² In that case, Lee and Michaels (the majority shareholder and president, who had not been directly involved in the disposal in the *NEPACCO* case) met with several people to arrange for the disposal of some of the hazardous substances accumulating from NEPACCO’s operations. These persons then hired Mr. Bliss to dispose of the waste.²⁹³ The court held NEPACCO, Michaels and Lee responsible as arrangers under section 9607(a)(3).²⁹⁴ Lee and Michaels raised the same arguments just discussed with regard to the *NEPACCO* case. Relying on the Eighth Circuit opinion in the earlier *NEPACCO* case, the court rejected these arguments.²⁹⁵

In *United States v. Mottolo*,²⁹⁶ the Court said that the sole shareholder/president and treasurer of a responsible corporation might be liable under section 9607(a)(3), which imposes liability for arranging for disposal.²⁹⁷ The facts concerning his involvement with the disposal were in dispute and thus summary judgment for the shareholder was denied.²⁹⁸

In *United States v. Ward*,²⁹⁹ a president and principal shareholder of the responsible corporation was held liable on a motion for summary judgment as one who arranged for the disposal of hazardous wastes under section 9607(a)(3).³⁰⁰ The defendant had arranged with another individual to haul and dispose of PCB contaminated oil from the corporate defendant’s site. The hauler and disposer loaded the contaminated oil into a tank and placed it in a van. He slowly leaked the oil along roadways and on a military reservation.³⁰¹ The court rejected the defendant’s argument that liability should only be imposed if the defendant knew of the improper disposal and held that the statute

289. This principle is discussed *supra* text accompanying notes 91-103.

290. 810 F. 2d at 744.

291. *Id.*

292. 667 F. Supp. 1298 (E.D. Mo. 1989).

293. *Id.* at 1303.

294. *Id.* at 1306.

295. *Id.*

296. 605 F. Supp. 898 (D.N.H. 1985).

297. *Id.* at 913-14.

298. *Id.*

299. 618 F. Supp. 884 (D.N.C. 1985).

300. *Id.* at 893-98.

301. *Id.* at 890-91.

required no such knowledge.³⁰² Further, such a requirement would encourage those involved with toxic substances to close their eyes and avoid liability.³⁰³

In *United States v. Northernair Plating Co.*,³⁰⁴ the court granted the government's motion for summary judgment against the sole shareholder/president of the corporation who had arranged for the disposal of the waste.³⁰⁵ In *Northernair* there were several defendants: the corporation, which had manufactured and disposed of the waste, the lessor, and the president/ shareholder. The court held all three could be responsible under CERCLA. The lessor was clearly an "owner," Northernair, the corporate defendant, was an "operator," and the shareholder/president was responsible since he arranged for the disposal.³⁰⁶

In *City of New York v. Exxon Corp.*,³⁰⁷ the city sought to hold a parent corporation, Refinement International, Inc., liable for the illegal disposal of toxic waste by its subsidiary, Newtown Refining Corp.³⁰⁸ Bribery gained the individual culprits access to the city landfills for the illegal disposal.³⁰⁹ The city sought to hold the parent corporation liable directly under CERCLA as one who arranged for the disposal under section 9607(a)(3) or as one who accepted hazardous waste for disposal under section 9607(a)(4).³¹⁰

The court applied the standards used for imposing liability on shareholders as owners or operators under section 9607(a)(2) to this case concerning liability under section 9607(a)(3) and (a)(4).³¹¹ The court reviewed the standards imposed by these courts which determined whether a particular shareholder was an "owner or operator." The court concluded that the question was "whether [the parent] was 'so intimately involved in the operation' of [the subsidiary] . . . with a sufficient degree of control over and participation in [the subsidi-

302. *Id.* at 895. Further, the court may have disbelieved Ward regarding his knowledge of the activity since 1) several alterations were made intentionally to the tank to allow it to leak the waste as desired and these alterations were made at the corporate defendant's plant using its employees, *id.* at 891, and 2) the hauler/dispenser had told Ward about the initial dumping at the military reservation. *Id.*

303. *Id.* at 895. The defendant also raised the statutory defense that a third party caused the improper disposal. See *supra* note 131 regarding these statutory defenses to CERCLA liability. The defense is limited to defendants who have not contracted with the third party. Here, either the individual or the corporate defendant had contracted with the third party for the disposal. *Id.* at 897.

304. 670 F. Supp. 742 (W.D. Mich. 1987).

305. *Id.* at 749.

306. *Id.* at 747. Two years later, the court apportioned the costs among the three defendants based upon equitable factors. The corporation and shareholder/president were responsible for two-thirds of the damage; the landowner one-third. *United States v. Northernair Plating Co.*, No. G84-1113CA7, Slip. Op. (W.D. Mich. Sept. 1989) (1989 U.S. Dist. Lexis 15913 at 3-10).

307. 112 Bankr. 540 (S.D.N.Y. 1990).

308. *Id.* at 542. The opinion is somewhat confusing on the ownership of seven related corporations. The court says that the subsidiary received the assets and stock of seven related companies comprising a waste oil business. *Id.* The court also says that an individual, Mahler, was the "sole shareholder" of each of these companies (with the exception of one, in which he owned 75%). Thus, it is unclear whether these seven companies were subsidiaries of Newtown or otherwise related.

309. *Id.* at 541, 542.

310. *Id.* at 542, 547.

311. *Id.* at 547-48. The court cited and discussed many of the cases discussed in the preceding section including *Shore Realty*, *NEPACCO*, *Kayser-Roth*, and *Bunker Hill*.

ary's] affairs that it is liable as a transporter" or an arranger.³¹² After an extensive review of the facts the court held that the parent was in fact "sufficiently involved in the affairs of its subsidiary, Newton, to be held directly liable as a generator or transporter of hazardous waste."³¹³

In earlier cases, such as *NEPACCO*, liability was imposed upon individuals who actually arranged for the disposal on behalf of the corporation. Similarly, a parent which actually arranges or transports the hazardous materials would be liable as an arranger or a transporter. Beyond direct arranging or transporting, what facts will indicate that the shareholder can be liable as an arranger or as a transporter? As in the case of the interpretation of "owner or operator," we need to define what a person who "arranged" for the disposal means,³¹⁴ or who "accepts" the waste "for transport."³¹⁵

In the cases which determined operator status, courts generally looked to the amount of involvement the shareholder in the management of or activities at the site or the corporation. Sufficient involvement could render one an "operator." The very term "operator" connotes one who has a certain level of involvement with the activity concerned. The concepts of "arranger" and "transporter," however, are of a different sort. One who is so involved with the activities of a corporation or site so as to be an operator, might not be a person "who arranged for disposal" or who "accepted any hazardous substance for transport." These latter two liability provisions imply a more direct involvement on part of the shareholder. While the "prevention test" recently set forth by the Western District of Michigan might serve to identify those who have sufficient control so as to be said to effectively "operate" the corporation or facility, the test is not sufficiently specific to identify those who "arranged" for disposal or "accepted" waste for transportation.

312. *Id.* at 548 (quoting in part *Colorado v. Idarado Mining*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,578, 20,579 (D. Colo. 1987)).

313. *Id.* at 552. The list of factors establishing this connection included:

1. Newtown was a wholly-owned subsidiary of Refinement;
2. Refinement had the power to appoint Newtown's officers and directors, to replace them as it saw fit, and to augment them with its own personnel;
3. Newtown and Refinement had certain directors and officers in common;
4. Refinement funded Mahler's salary while he was president of Newtown;
5. Refinement had ultimate authority over all of Newtown's major expenditures;
6. Refinement negotiated the purchase of fifteen trucks by Newtown, arranged financing for the purchase, and guaranteed the loan for the purchase;
7. Refinement guaranteed another of Newtown's loans for \$200,000;
8. Refinement contributed \$3 million to Newtown's operations in 18 months, because Newtown was losing several million dollars per year;
9. Refinement occasionally had direct contacts with Newtown's customers regarding their accounts;
10. Refinement paid for Newtown's insurance coverage.

Later in the opinion, the court mentions the concept of awareness, but it is unclear what its relevance is or what part it plays in the test for liability. The court discusses whether the parent was aware of the disposal business of its subsidiary and found that it was aware of this aspect of the subsidiary's business. *Id.* at 550-52. Whether it was aware of the illegal nature of the operation was irrelevant—although the facts tended to show the parent was probably aware of this aspect as well. *Id.* Further, the court believed that the parent had an "affirmative duty to ensure that its subsidiary was properly protecting the public from the environmental health and safety hazards inherent in" the business of the subsidiary. *Id.*

314. 42 U.S.C.A. § 9607(a)(3) (West Supp. 1990).

315. 42 U.S.C.A. § 9607(a)(4) (West Supp. 1990).

In *Exxon*, the court imposed liability on the parent because it had exercised control and participated in the affairs of the subsidiary, which was an arranger or transporter. The court in *Exxon* was stretching the limits of the statute when it applied standards developed in owner/operator cases to the question of arranger or transporter liability since arranging and transporting require more direct involvement. However, as discussed in the next section such liability is both supported by the intent of Congress to place liability on those "responsible" for the harm and is also consistent with principles of accident responsibility.

The liability imposed in *Exxon* also raises the question that is raised by the *Joslyn* decision: whether a shareholder can be held directly liable under CERCLA when facts do not support piercing the corporate veil. This tension between traditional corporate law and CERCLA is explored in the next part.

IV. GUIDELINES FOR JUDICIAL AND LEGISLATIVE DECISIONMAKING

A. *Judicial Decisionmaking*

Assume Corporation X, manufactures pesticides and creates toxic waste as a by-product. It is owned by Ms. Smith, who controls and actually manages all of the affairs of the corporation and the plant where the pesticides are produced. The toxic waste is regularly spilled in the backyard of the plant. In this case Corporation X is an "operator" and the question is whether Ms. Smith can also be held liable as an "operator" directly under CERCLA.

Courts confronted with the question of shareholder liability under CERCLA must engage in three inquiries. The first inquiry involves statutory interpretation and asks whether CERCLA itself can and does impose liability on shareholders of closely held corporations. If the court concludes that CERCLA does impose such liability, then the second inquiry focuses on the interplay and possible conflict between CERCLA and the state corporation laws granting limited liability to shareholders. This interplay involves questions of the scope of federal common law and of preemption. The third inquiry is to determine whether a shareholder is liable under CERCLA under a given set of facts. It requires courts to develop a test for determining when a person is or is not an "operator" (or an "arranger" or "transporter").

This part concludes that shareholders can be liable directly under CERCLA and that state law limited liability is not a bar. The courts can and should create a uniform federal rule of decision, with guidelines, regarding whether a shareholder is an "operator."

1. *Can CERCLA Impose Liability Directly on Shareholders?*

a. *Preliminary Matters and a "Common Sense" Approach*

Shareholders have been held directly liable under CERCLA as "owners or operators," "arrangers" and as "transporters." In order to narrow the focus

somewhat to analyze shareholder liability under CERCLA, the inquiry shall be whether a shareholder can be an "operator."³¹⁶

Deciding whether a shareholder of a corporate operator can also be an operator includes a question of whether there can be more than one operator. Congress contemplated the possibility that multiple parties could be owners or operators. For example, Congress exempted from the definition of "owner or operator" certain secured lenders.³¹⁷ If a corporation was found liable as an operator and its secured lender was also found to be an operator, the latter finding would not absolve the corporation of responsibility as an operator.

Common sense tells us that a person should not be excluded from the possibility of being an operator merely because he owns stock in a corporate operator. For example, assume Mr. Jones promotes himself as a "Pesticide Plant Operator" and his business is running, managing and otherwise operating pesticide companies. Corporation X, the pesticide producer, hired Mr. Jones to run all aspects of the business. Mr. Jones would be an "operator." If Mr. Jones were now given a share of stock in Corporation X, his status should not be affected. The First Circuit agrees with this reading of the statute. It said that by imposing liability on owners *or* operators, CERCLA implies that "a person who is an operator of a facility is not protected from liability by the legal structure of ownership."³¹⁸

b. *Statutory Interpretation*

This section looks at the statute itself and several ways of interpreting it in an effort to determine whether a shareholder of an operator can also be an operator.

(1) *Plain Meaning*

CERCLA does not define "operator" as an independent term. Rather, it defines "owner or operator" somewhat circuitously as "any person owning or operating such facility."³¹⁹ Although the United States Supreme Court has recognized that statutory interpretation begins with the language of the statute,³²⁰ it looks freely to legislative history to ascertain the legislative intent or meaning of the statute.³²¹ While courts sometimes turn to dictionary definitions to ascertain the plain meaning of a term, such definitions are not very helpful here. One dictionary defines "operator" as "one that produces a physical effect or engages

316. After this analysis follows a discussion of the standards to apply when considering shareholders as "arrangers" and "transporters." As discussed earlier, shareholders are not "owners" unless the corporate veil is pierced.

317. See *supra* note 132 and accompanying text. See also *infra* notes 327-34.

318. *United States v. Kayser-Roth*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

319. See *supra* note 136.

320. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976).

321. *United States v. American Trucking Ass'n*, 310 U.S. 534, 542-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 562 (1940). For a review of current Supreme Court jurisprudence regarding the use of legislative history in construing statutes see Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990).

himself in the mechanical aspects of any process or activity."³²² A person who effectuates the activities at a facility can be an operator. That person could be almost anyone: officer, manager, shareholder or employee.

(2) *Legislative Intent*

In enacting CERCLA, Congress said that it intended to protect the public from hazardous waste sites by providing for cleanup and to "provide for liability of persons *responsible* for releases of hazardous waste at such sites."³²³ What did Congress mean by "responsible"—did it mean responsible in some narrow legal sense or did it use the term in a more ordinary, everyday sense? Congress created the rules of liability in CERCLA so Congress would not have meant to refer to another independent legal standard (such as negligence) for "responsible" in the legislative history. A corporation which owned a contaminated facility might be "responsible" for the contamination. The corporation acted through individuals, however, who operated or managed the subsidiary and controlled the activities at the facility. In its everyday sense, persons "responsible" would include those individuals who made the decision on behalf of a corporation to dispose of hazardous waste improperly or who carried out the improper disposal and had the power to halt it. "Responsible" would include a parent corporation which actively manages a subsidiary or directs its waste disposal. It would include a shareholder (individual or corporate) who controls the operations and management of a facility or the subsidiary. All of these persons are to some extent "responsible" in the everyday sense of the word for the disposal. To interpret the statute consistent with the intent of Congress means including such persons within the definition of "operator." A number of courts have focussed on this Congressional intent to place the cost on those who were "responsible" for the problem in holding liable those who participated in the management of the site, directed the disposal or otherwise affected the disposal activities.³²⁴

Congress also specifically intended to place the cost of cleanup on industries and consumers who have or will benefit from products that cause the pro-

322. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1581 (Unabridged, 1981). Another definition of operator is "one who does or effects something, a worker, an agent, . . . One who performs the practical or mechanical operations belonging to any process, business or scientific investigation; a person professionally or officially engaged in doing this . . . One who works a business, undertaking, etc." THE OXFORD ENGLISH DICTIONARY, 1995-96 (Compact Edition, 1971).

323. H.R. REP. NO. 1016, Part I, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. CODE, CONG. & ADMIN. NEWS 6119 (emphasis added).

324. See, e.g., *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) and cases cited therein. *City of New York v. Exxon Corp.*, 112 Bankr. 540, 546 (S.D.N.Y. 1990) and cases cited therein. Although these cases refer to earlier cases rather than to the legislative history directly, the reference to the Congressional intent is clear in each case.

One could argue that this Congressional intent is indeterminate. Specifically, one could say that when Congress intended to place liability on corporate managers and shareholders it was clear and direct. For example, Congress explicitly places liability in the form of a penalty on certain persons for failing to withhold specified taxes. 26 U.S.C. § 672(a) (1989). Congress has not been so explicit in the CERCLA context. However, the congressional intent to place cleanup costs on those "responsible" is some indication of how to interpret the statute. It is but one of several indications supporting the construction that shareholders can be within the group of those who might be liable as operators.

duction of hazardous waste.³²⁵ This Congressional intent shows an intent to internalize costs.³²⁶ One way to assure that an entity properly "internalizes" costs is to place responsibility on those who control the activities at the facility or at the corporation. Potential liability will encourage those in charge to dispose of the hazardous substances properly, which will be paid for by the corporation and ultimately the consumer.³²⁷ Interpreting "operator" to include shareholders who occupy positions of power, who control, or who actually participate in the management of the facility or the waste disposal, will further these Congressional goals.³²⁸

Another indication of legislative intent to impose liability on shareholders who operate the facility can be found in the exception for secured lenders. Congress provided that the term "owner or operator" does not include a "person, who, without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility."³²⁹ The exception shows, however, that Congress contemplated the fact that secured creditors could be liable under CERCLA as an "owner or operator" if they met the statutory requirements. Further, Congress related the exception for secured creditors to their involvement in the management of the facility. This shows an intent to impose liability when the creditor is active, not passive. This liability is similar to "operator liability."³³⁰

325. In imposing taxes on various industries—primarily the petro-chemical industries—to fund a significant portion of "Superfund," the Senate Committee on Environmental and Public Works explained as follows:

[F]inancing the Fund primarily from fees paid by industry is the most equitable and rational method of broadly spreading the costs of past, present and future releases of hazardous substances *among all those industrial sectors and consumers who benefit from such substances*. The concept of a fund financed largely by appropriations was not adopted. A largely appropriated fund establishes a precedent adverse to the public interest Too often the general taxpayer is asked to pick up the bill for problems he did not create; when costs can be more appropriately allocated to specific economic sectors and consumers, such costs should not be added to the public debt (emphasis added).

S. REP. NO. 848, 96th Cong., 2d Sess. (1980). Although this Report explained an earlier version of the legislation, this funding was adopted in CERCLA, with minor changes in the division of taxes imposed on the various petro-chemical industries. See, Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 12 (1982).

Courts have also referred to this Congressional intent to place the cost on those who "created and profited from the sites and upon the Chemical industry as a whole." *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986).

326. For a discussion of cost internalization see *supra* notes 280-81 and accompanying text.

327. See *supra* note 281.

328. This is also consistent with the approach of placing the liability on the "least cost avoider," discussed earlier. See *supra* text accompanying notes 280-81.

329. 42 U.S.C.A. § 9601(20)(A) (West 1983 & Supp. 1989). See *supra* note 132.

330. Arguably the secured creditor exception only applies to secured creditors that are "owners" since it excepts a shareholder who has an "indicia of ownership" to protect its security interest. It does not apply to the creditor as an "operator," yet courts have not been clear regarding its application. The recent decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), considered the liability of a secured lender who did not foreclose on its interest in the real property but took over the personal property in order to liquidate it. These facts may indicate operator liability. The court, however, did not consider the question of operator liability but refused to grant summary judgment for the creditor because it did not meet the exception for secured lenders since it had participated in the management of the corporation. Thus, the court in *Fleet Factors* created a third category of lender liability. Creditors can be liable as owners when they foreclose (and are no longer within the secured creditor exception). They can be liable as operators. Third, a creditor can be liable because it has an "ownership" interest (*i.e.*, security interest) and participates in the management of the facility. Seemingly, this is a lesser standard than required for operator liability.

In the corporate hierarchy, shareholders occupy a place *in* the corporation while the typical creditor is a lender *to* the corporation. Creditors are generally perceived to be further removed from the corporation than shareholders. Under this structure the creditor will be paid before the shareholder should the corporation liquidate. Yet it has been long recognized that a creditor can become too involved with a debtor so as to lose its status with respect to other creditors. For example, a creditor's claim may be subordinated to other debts under the doctrine of equitable subordination.³³¹ However, the creditor still maintains its position in the hierarchy over shareholders.

If Congress intended to hold secured parties liable when they participate in the management of the facility³³² or are operators, then, *a fortiori*, Congress intended to hold liable shareholders in a closely held corporation who are similarly involved³³³ since they occupy a lower position in the corporate hierarchy.

(3) Remedial Nature of the Statute

The primary purpose of CERCLA is to provide for the cleanup of sites contaminated with hazardous substances.³³⁴ CERCLA is remedial in nature. As a general principle of statutory interpretation, courts are to construe remedial statutes broadly. In the CERCLA context courts have recognized that CERCLA is remedial³³⁵ and is to be liberally construed.³³⁶ According to the Eleventh Circuit, "ambiguous statutory terms should be construed to favor liability for the costs incurred by the government" in order to achieve this remedial purpose of CERCLA.³³⁷ Under this approach, the term "operator" should be construed broadly and any doubt about whether a shareholder can be an opera-

331. See, e.g., *Pepper v. Litton*, 308 U.S. 295 (1939) and *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307 (1939), the two seminal cases concerning the doctrine.

Another example is the creditor who exercises too much control over the debtor may be deemed an "insider" and be subject to a preference period of one year instead of three months in the event of bankruptcy. In this case, the creditor still maintains its position in the hierarchy above the shareholders.

332. The meaning of the phrase in connection with lender liability generally is discussed *supra* text accompanying note 132.

333. This argument should not be confused with the argument courts have used to reason that a *shareholder* who holds indicia of ownership and participates in the management is an owner (e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (1984)). This section by its terms is applicable to those who hold the indicia of ownership to protect a security interest, which is not the same as a share of stock. See *supra* text accompanying notes 144-57.

334. H.R. REP. NO. 1016, Part I, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

335. *United States v. Kayser-Roth*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990) (stating CERCLA is "overwhelmingly remedial") citing *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986).

336. *United States v. Kayser-Roth*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990), citing *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986), discussed *supra* text accompanying notes 206, 211, 283-90.

But see *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988) (declining to interpret § 9607 liberally so as to hold a contractor, who had built a plant to an owner's specifications, responsible).

337. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990).

tor, independent of the corporation, should be resolved in favor of the government.

2. *The Interplay Between State Corporate Law of Limited Liability and CERCLA*

a. *Federal Common Law*

Interpreting CERCLA is a matter for the federal courts.³³⁸ Deciding whether a shareholder is or may be an "operator" could be viewed as either 1) filling a gap in the federal statute or 2) statutory interpretation. In either case deciding whether a shareholder is directly liable under CERCLA could be considered to be the creation of federal common law, since the line between statutory interpretation and common law is far from clear.³³⁹

Most authorities have cast the questions regarding federal common law as a two part test: 1) whether the matter is subject to federal or state law and 2) if it is subject to federal law, whether the court should look to state law for the content of the rule or develop its own federal rule of decision.³⁴⁰

The first prong of the test is met in any CERCLA action since a gap must be filled or a term interpreted in a federal statute.³⁴¹ Federal common law is also created to protect the interests of the United States, *e.g.*, when the United States is a party to the suit³⁴² or has a strong financial interest in the out-

338. The federal courts have exclusive jurisdiction over CERCLA matters, 42 U.S.C.A. § 9613(b) (West 1983 & Supp. 1989). They will be the primary interpreters of the term "operator."

The presumption that federal and state courts have concurrent jurisdiction and that state courts may decide rights established by federal law does not apply when Congress grants exclusive jurisdiction to the federal courts. *See Taffin v. Levitt*, 110 S. Ct. 792, 795 (1990). Further, if a state court happens to rule on a matter within the exclusive jurisdiction of the federal courts (*e.g.*, by way of a defense raised by a party) there is some indication that little effect should be given to the state court ruling. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 668 (1978) (Brennan, J., dissenting).

339. "The demarcation between 'statutory interpretation' or 'constitutional interpretation,' on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative purpose with respect to the issue at hand attenuates." BATOR, MELTZER, MISHKIN, SHAPIRO, HART & WECHSLER'S, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 863 (3d ed. 1988) [hereinafter HART & WECHSLER]. *See also* Field, *supra* note 24, at 890-96. Cases creating federal common law have concerned not only matters traditionally regarded as "common law," *see, e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (requiring the development of federal common law to decide the government's recovery on a check) but also matters of statutory interpretation. *See, e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570 (1955) (concerning the interpretation of "children" under the Copyright Act).

340. Field, *supra* note 24, at 886 and authorities cited therein; E. CHERMERINSKY, *FEDERAL JURISDICTION* § 6.2.1, 298 (1989). *See also* HART & WECHSLER, *supra* note 339, at 866. Professor Field has argued that only the second prong of this two part test is necessary. She argues that federal common law can only be "made" in cases involving questions based upon the Constitution, a federal statute, or other federal interest. Cases based on these grounds will automatically satisfy the first prong: that a federal interest is involved. Field, *supra* note 24, at 950-53.

341. Regarding the federal courts power generally to create federal common law when there is a gap, *see* *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) and Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision*, 105 U. PA. L. REV. 797, 800 (1957). Regarding CERCLA, Congress intended the "courts to develop a federal common law to supplement the statute." *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988). *See also* *Louisiana-Pacific Corp. v. L-Bar Prods., Inc.*, 909 F.2d 1260 (9th Cir. 1990).

342. *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *See also* E. CHERMERINSKY, *supra* note 340, § 6.2, at 301-05; Field, *supra* note 24, at 953-54, and cases cited in each.

come.³⁴³ In many CERCLA cases the United States is a party to the suit.³⁴⁴ In addition, the federal government often has an interest in CERCLA cases brought by others. In some cases a person who is not a "responsible person," may have cleaned up a site or taken other "remedial action." If that person cannot recover from a "responsible person" Superfund will reimburse the person who performed the cleanup.³⁴⁵ Since the government has an interest in keeping the levels of the Superfund high, it has an interest in the private action under CERCLA between the person who performed the cleanup or remedial action and the "responsible party."

The key question becomes whether to borrow state law to determine who is an operator or to develop a uniform federal rule as to shareholder liability as an "operator." First, the problem is not simply one of borrowing or adopting state law to determine who is an operator. State law has not developed a definition of "operator" that can be borrowed here. The problem is, therefore, unlike several Supreme Court cases which borrowed state law.³⁴⁶ Rather, the question is whether the federal courts should adopt the state corporate concept of limited liability when they define "operator." A shareholder would argue that direct shareholder liability cannot exist under CERCLA if CERCLA definitions are read to include incidents of state law. Specifically, if state law is incorporated into the determination of whether shareholders are "operators" when their corporations are operators, then they are protected by the state rule of limited liability.³⁴⁷ The government would argue that these incidents of state law should not be included in the definition of "operator."

The Supreme Court has set forth several factors for courts to consider in deciding whether to adopt state law or create a federal rule of decision when developing federal common law. The most frequently cited factor is the demand for uniformity under a particular federal program.³⁴⁸ Courts should also consider whether applying state law would "frustrate specific objectives of the fed-

343. *Boyle v. United Tech. Corp.*, 470 U.S. 500 (1988).

344. The United States was a named party in eleven of the twenty-odd cases discussed in this Article.

345. For example, a local government or a private party may perform a cleanup in some cases. *See* §§ 9604, 9607(a)(4)(B), 9611(a)(2).

346. For example, the CERCLA problem is very different from the problem presented in *De Sylva v. Ballentine*, 351 U.S. 570 (1955), which involved the interpretation of the word "children" in the federal copyright law. The states have developed a body of family law, which the federal courts have not, and the Court therefore decided to adopt state law in defining the term especially since determining the legal relationships of other persons who might be entitled to inherit would require reference to state law. *Id.* Interestingly, the Court noted that "this does not mean that a state would be entitled to use the word 'children' in any way entirely strange. . . ." *Id.* at 581.

347. In this case, a shareholder could only be liable if one of the state exceptions to limited liability were found: the corporate veil were pierced or the corporate actor rule applied.

348. In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the Supreme Court said: "Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *Id.* at 728.

eral program"³⁴⁹ and whether and to what extent a federal rule would "disrupt commercial relationships predicated on state law."³⁵⁰

First, CERCLA is a national response to a national problem.³⁵¹ As such, CERCLA demands uniformity of application. Several courts have held that CERCLA requires the development of a uniform federal rule of decision in other contexts—such as the standards needed to pierce a corporate veil,³⁵² and the standards of successor liability.³⁵³ It is significant that the United States Supreme Court has recognized that environmental problems "are not susceptible of a local solution."³⁵⁴ Thus, the courts must develop a uniform definition of the term "operator." Second, applying state law could frustrate the purpose of placing liability on those "responsible." A person otherwise responsible in the ordinary sense would escape liability merely by virtue of stock ownership if the state law were fully incorporated into the federal definition. The shareholder's best argument is based on the third part of the *Kimbell* test: that a rule imposing liability on the shareholder will interfere with his relationship with the corporation established by state law. This argument has some merit to it on a superficial level only. In the CERCLA context, Congress has already disrupted commercial relationships by imposing a new form of liability on a number of persons. Thus, the third point is not logically applicable in CERCLA cases. Further, any such disruption is outweighed by the other two factors just discussed: the need for uniformity and the fact that applying state law might interfere with a Congressional purpose.

The shareholders might also argue that uniformity could be achieved by adopting state law since virtually every state grants limited liability to shareholders of a corporation. However, state corporate laws vary with respect to when and to what extent shareholders can be held liable. For example, New York places liability on certain shareholders for unpaid wage claims.³⁵⁵ The state corporate laws vary with respect to shareholder liability for acts taken by

349. *Id.* The Court said:

Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

350. *Id.* at 729.

351. *In re Acushnet River*, 675 F. Supp. 22, 31 (D. Mass. 1987); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991) (quoting *Acushnet River*). The program in *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973), was similarly described as being "national in scope," *id.* at 597, and the court in *Lake Misere* declined to "borrow" state law.

352. *Mobay Corp. v. Allied Signal, Inc.*, 753 F. Supp. 1248 (D.N.J. 1991); *United States v. Kayser-Roth*, 724 F. Supp. 15, 19-20 (D.R.I. 1989); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1201-02 (E.D. Pa. 1989); *In re Acushnet River*, 675 F. Supp. 22, 30-31 (D. Mass. 1987). See *supra* text accompanying notes 24-27.

353. *Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1986).

354. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) and cases cited therein.

355. For example, N. Y. BUS. CORP. LAWS § 630(a) (McKinney 1986) provides:

The ten largest shareholders, . . . of every corporation . . . no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market . . . shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation.

a director with the shareholder's knowledge.³⁵⁶ Further, some states have enacted or are considering special laws for close corporations, some of which include a provision that the failure to observe corporate formalities is not a ground for disregarding the rule of limited liability.³⁵⁷ Thus, state-level uniformity is superficial and illusory.

Furthermore, the concern for federal uniformity is not only for current uniformity but also for uniformity in the future. Even if a federal court adopts state law as the federal rule of decision, states may change their current rules and thus leave the next federal court to decide the question in the next jurisdiction with a new aberrant state law.³⁵⁸ Finally, if the state law is incorporated with respect to shareholder liability as an operator, state law would be incorporated with respect to others who might be considered operators. Any state statute protecting one from certain forms of liability would arguably have to be adopted by the federal courts in defining "operator"—a result that would be anything but uniform. To assure national uniformity, the courts must develop uniform federal rules of decision with respect to CERCLA liability.

The need for uniformity and the interest the United States has in CERCLA actions require the courts to develop a federal rule of decision rather than adopting state law in developing the federal common law that will accompany CERCLA.

b. *Preemption: The "Conflict" with State Law*

Like the relationship between statutory interpretation and federal common law, preemption and federal common law are related principles and it is not clear where one ends and another begins. Principles of both can be used to "displace" state law.³⁵⁹

Courts which conclude that CERCLA can be read to impose liability on a shareholder in his, her or its own right need not be concerned with the state rule of limited liability. First, if one accepts the view that any person who is found to

356. Compare DEL. CODE ANN. tit. 8 §§ 278, 282 (1983) (Shareholders liable for the lesser of the extent of the distribution to them or their pro rata share of the claim three years following dissolution) with REVISED MODEL BUS. CORP. ACT §§ 6.33, 6.44, 14.07 (1985) (any action against a dissolved corporation must be brought within five years, shareholders liable to directors if director must reimburse corporation for improper distribution and shareholder knew the distribution was in violation of the corporate laws or articles of incorporation).

357. For example, the MODEL STAT. CLOSE CORPORATION SUPP. to the REVISED MODEL BUS. CORP. ACT § 25 (1985) provides:

The failure of a statutory close corporation to observe the usual formalities or requirements relating to the exercise of its corporate powers or management of its business and affairs is not a ground for imposing personal liability on the shareholders for liabilities of the corporation.

Pennsylvania recently adopted a new corporation law and included a form of statutory close corporation patterned after this model. PA. BUS. CORP. LAW OF 1988, 15 PA. CONS. STAT. ANN. §§ 2301 *et. seq.* (Purdon Supp. 1990). See Garrity, *The New Pennsylvania Corporation Law*, 45 BUS. LAW. 57, 61 (1989). See also CAL. CORP. CODE § 300(e) (West 1990).

358. The possibility of abuse has been recognized in several cases, see, e.g., *United States v. Little Lake Misere Land Co., Inc.* 412 U.S. 580 (1973).

359. See *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988). In *Boyle*, the Court referred to some of the principles applied in deciding whether to create a uniform federal rule of decision in federal common law cases. *Id.* at 507-08 (referring to *Kimbell Foods*, *supra* notes 348-50, regarding the frustration of federal objectives by applying state law).

be an "operator" is liable directly under CERCLA, then there is no conflict between CERCLA and the state law of limited liability. Liability is not imposed because of the relationship of the shareholder to the responsible corporation; liability is direct.

Alternatively, one could say that there is a direct conflict here—the shareholder is liable under CERCLA while such liability would be barred under state law. In the case of a direct conflict, federal law controls.³⁶⁰

Finally, there is a third possibility: it is not clear whether a conflict exists or not. CERCLA does not expressly place liability on shareholders of operator corporations, and the shareholders will argue that, absent a clear indication from Congress, they are protected by the rule of limited liability. The Fifth Circuit, in *Joslyn Mfg. Co. v. T.L. James & Co.*, accepted this argument, although it did not discuss preemption.³⁶¹ As discussed earlier, the reliance in *Joslyn* that limited liability prevails unless Congress indicates otherwise is misplaced³⁶² since that court assumed limited liability was a common law principle. The court was incorrect in applying the concept of limited liability so broadly to a federal statute.

Two additional arguments indicate that federal law, *i.e.*, CERCLA, controls over the rule of limited liability if the conflict is deemed unclear or indirect. First, CERCLA specifically provides that the liability placed upon owners, operators, arrangers and transporters is imposed "notwithstanding any other rule of law."³⁶³ This suggests that Congress recognized that there may be conflicts with other rules of law and that it intended CERCLA to prevail. In fact, Congress seems to be paraphrasing the supremacy clause itself here.

Second, a state statute can be "preempted" or, as the Supreme Court recently held, "displaced," when the state law "'would frustrate specific objectives' of federal legislation."³⁶⁴ The United States Supreme Court has held a state law granting immunity to parole board members for their acts does not apply in a case brought under a federal law (in that case, a civil rights ac-

360. U.S. CONST. art. VI cl. 2.

361. 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991), *see supra* text accompanying notes 158-84. The court said that it is the rule that when a legislature wants to "change the interpretation of a judicially created concept, it makes that intent specific." 893 F.2d at 83 (emphasis added). And later it said, "[w]ithout an express Congressional directive to the contrary, common law principles such as limited liability, govern our court's analysis." *Id.*

362. As discussed earlier, limited liability is a creature of statute (usually state statute). The principle of limited liability did not develop as part of the common law, and Congress has not altered the common law. Instead, it has created in CERCLA a law that imposes liability on persons who may happen to be shareholders of a corporation that may or may not itself be liable as an owner or operator.

363. 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1989) provides: "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section— . . . [four categories of liable parties] shall be liable for . . . all . . . costs of removal or remedial action."

364. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 507 (citing *Kimbell Foods*). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 481 (2d ed. 1988); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)). This shows the continuing confusion between certain types of "preemption" and "federal common law" as *Boyle* is generally considered to be a federal common law case.

tion).³⁶⁵ At least two district courts have held that CERCLA preempts state tort immunity statutes.³⁶⁶ These cases are similar to the question of shareholder liability since in both cases the defendant is claiming that state law protects one from liability.³⁶⁷ In each case, CERCLA preempts state law since state law would absolve one from liability intended by Congress.³⁶⁸

This does not mean that limited liability should be abolished in all CERCLA cases. That would mean that whenever a corporation was found responsible its shareholders would be liable as well. Rather, once a court determines that a person is an operator, that person, shareholder or not, is liable in her own right. To the extent the principle of limited liability conflicts with that liability, the state statutes granting limited liability are preempted.

3. *A Test for Shareholder Liability*

a. *Operators*

First, the development of a test for determining when a person is an operator is a matter of statutory interpretation or the creation of federal common law. The federal courts have the power to create the tests without regard to

365. See *Martinez v. California*, 444 U.S. 277, 283 (1980) (A statute granting immunity to members of a parole board for their actions in releasing a person on parole, would not protect the parole board members in a suit based on 42 U.S.C. § 1983).

366. *Artesian Water Co. v. Government of New Castle*, 605 F. Supp. 1348 (D. Del. 1985). See also *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696 (S.D. Ind. 1988). In *Artesian*, a state statute provided immunity to all local governments unless another statute provided otherwise. The county had owned and operated a landfill. The plaintiff spent \$10 million in cleanup and other response costs and sued the county to recover these costs. The county asserted its immunity under state statute. The court said that CERCLA places liability on the county while the state statute removes it and held, "If this is not an actual conflict situation, it clearly is one in which Delaware's Tort Claims Act stands as an obstacle to the accomplishment of the full purposes and objectives which Congress sought to fulfill in enacting CERCLA. Therefore, the Tort Claims Act is preempted." 605 F. Supp. at 1354.

In 1986, Congress made it clear that state and local governments could be liable under CERCLA. First, Congress exempted these governmental units from being "owners or operators" if they had acquired their ownership involuntarily (such as through a tax foreclosure). The section went on to make it clear, however, that such an involuntary acquisition would not absolve a state or local government from liability if it were responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5-8 (1989) (plurality opinion). See also 491 U.S. at 5-23 regarding the ability of Congress to use the commerce clause to override the eleventh amendment.

Normally states are immune from monetary liability claims of individuals under the eleventh amendment. However, Congress can override this immunity by a clear indication and the proper exercise of one of its powers (here the power based on the commerce clause).

367. A similar argument was made with respect to the liability of dissolved corporations under CERCLA. Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131 (1989).

368. At first blush, it might seem that a distinction can be made between the immunity statutes and the statutes providing limited liability for shareholders. The immunity statutes provide an exception to liability for certain acts of governments or their agents. The exception to liability is direct. The corporate statutes create a system through which a corporation can be formed and can act, and limited liability for corporate acts is given to shareholders. When examined further, however, these two sets of statutes are quite similar. Governments must act through agents: officials, employees, parole board members. Corporations too must act through agents: officers, directors and ultimately the shareholders who control the election of the directors and employment of officers. In both cases a federal statute would impose liability while a state statute would relieve one of that liability. If the state immunity statutes have been found to be inconsistent with CERCLA and therefore preempted, so should the limited liability provisions of corporate laws when they conflict with a finding that the shareholder is an operator and thus liable.

state law and, in fact, courts should disregard state law in the interests of uniformity.³⁶⁹

In considering the liability of shareholders, two parameters are important. One is the degree of involvement the shareholder has with the toxic waste disposal and the other is the character of the shareholder (individual or corporate). Several examples of shareholder involvement will help define the contours of a test to be applied with respect to shareholder liability as an operator.

1. Corporation X manufactures pesticides. It owns its own plant and surrounding land. After manufacturing the pesticides, Corporation X regularly spills toxic by-products onto its land. Ms. Smith is the sole shareholder of X Corporation. She controls and actually manages all aspects of the corporation and of the production and activities at the plant.

2. Same as above except that Ms. Smith has hired someone else to run the plant. She has very little contact with the management and operations at the site itself, although she continues to manage and have complete control over the corporation.

3. Corporation X manufactures pesticides, it has always disposed of the toxic by-products properly and has respected all laws and regulations concerning the environmental aspects of its business. Ms. Smith decides to retire. She wants to continue to own Corporation X, but wants no involvement with it whatsoever. She appoints her son as the sole director and president. Her son has worked in the business for some time and has always acted responsibly with respect to all aspects of the business, including environmental matters.

The individual shareholder could be replaced in each of these three examples with a corporate shareholder, producing a parent/subsidiary effect. For example:

Assume the same facts as in number 1 above except that Corporation X is owned by Parent Corporation. Parent Corporation approves all hiring and firing, it reviews the finances and must authorize all expenditures over \$1000. It approves the environmental policy at the facility and Parent's officers, directors and shareholders know about the disposal of the toxic by-products at the site.

The only difficulty as we move from individual shareholders to corporate shareholders is that it is harder to determine for whom the corporate agents are acting. That is, the corporate shareholder must act through agents. These agents are often directors or officers of the parent corporation as well as the subsidiary. When they act it is difficult to determine whether they are acting for the parent or the subsidiary.³⁷⁰

From the principles of statutory interpretation in the CERCLA context, discussed earlier,³⁷¹ we can identify factors that indicate whether one is an operator. Each of these factors represent one or more of the following considerations: a "plain meaning" approach, an approach placing liability on those "responsible," an approach providing an appropriate "deterrent effect," as well as a "broad interpretation" approach. The factors that indicate a shareholder may be an "operator" under CERCLA include:

369. See *supra* text accompanying notes 349-57.

370. See, e.g., *Joslyn Mfg. Co. v. T.L. James & Co.*, 696 F. Supp. 222, 230-31 (W.D. La. 1989), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991) (respecting the corporate "fiction" that the officers wore the proper hats at the appropriate times when the court considered the question of veil piercing).

371. See *supra* text accompanying notes 316-38.

1. actual participation in the management of the site
2. ability to control the management of the site
3. actual participation in the management of the corporation
4. ability to control the management of the corporation³⁷²

CERCLA imposes liability on the "operator" of a facility. In the first example, set out above, the shareholder is actually managing the facility. This is sufficient to consider her an "operator." To do so furthers all of the goals of the statute, including placing the costs on those "responsible" and of internalization of costs. It is also faithful to the remedial nature of the statute. Thus, the first factor is sufficient to create liability as an operator. As the courts have done in the past, they will have to look at the specific facts to determine whether a shareholder was "managing" or "operating" the facility.

In the second example, the shareholder has only the power to control the facility through control of the corporation. Someone else is now managing the facility itself. Nevertheless, the shareholder cannot escape liability by hiring someone else and turning a blind eye. In fact, several courts have recognized the danger of allowing a shareholder in a position of power to claim that he or she did not know about the activity and therefore should not be liable.³⁷³ Further, although the statute imposes liability on one who operates a "facility" the factors concerning participation in and power over the *corporation* are relevant to show participation in and ability to control the facility. This scenario is covered by the second and third factors, either one of which is sufficient to consider the shareholder an "operator." The shareholder has the ability to control the facility; the shareholder is actually managing the corporation and through that management has the ability to manage the facility. Likewise any parent in either position should also be considered an operator, but, as mentioned earlier, proof may be more difficult in the case of a parent/subsidiary relationship.

For the most part, the courts have developed tests appropriate to the language and intent of CERCLA and have held shareholders liable in situations similar to the first two examples.³⁷⁴

A variation of the first two examples is the shareholder who does not own a majority of the shares but who actually wields power or is active at the facility or in the corporation. So far, courts that have considered the liability of a minority but active shareholder have held that such a person may be liable.³⁷⁵

372. Additional factors may indicate the presence of one or more of the above factors. For example, actual participation in the waste disposal or awareness of the disposal could indicate some degree of participation in or control over the facility. The fact that one was receiving a benefit from the disposal might also tend to show control.

373. On several occasions courts have explicitly refused to relieve one of liability on a claim of ignorance. See, e.g., *United States v. Ward*, 618 F. Supp. 884 (D.N.C. 1985), discussed *supra* text accompanying notes 299-303.

374. The exception is, of course, *Joslyn*. See *supra* Part III for a discussion of the cases concerning shareholder liability under CERCLA.

375. See, e.g., *Riverside Mkt. Dev. Corp. v. International Bldg. Prod.*, No. 88-5317, Slip. Op., (E.D. La. May 23, 1990) 1990 U.S. Dist. Lexis 6375; *United States v. McGraw Edison Co.*, 718 F. Supp. 152 (W.D.N.Y. 1989); *Kelley v. Arco Indus. Corp.* 723 F. Supp. 1214 (W.D. Mich. 1989). See *supra* text accompanying notes 259-62, 252-57, and 266-78, respectively.

Since each of these cases was decided on pre-trial motions there has as yet been no ruling on the merits in these cases.

Only one court has considered the liability of the passive shareholder—the third example. That court granted summary judgment for a shareholder who owned 85 percent of the stock, was chairman of the board, and a principal source of money but who was only minimally involved in the operations at the facility.³⁷⁶ Other courts have said in passing that in order to hold a shareholder liable more is required than mere control or power and have implied that the power must be exercised. However, these cases involved situations in which the shareholders had in fact exercised the power and thus this language is dictum.³⁷⁷ On the other hand, the court in the *Arco Industries* and *Thomas Solvent* cases expressly indicated that the power to control the corporation was to be taken into account in determining whether a particular individual could have prevented the harm.³⁷⁸ As written the test might place liability on a sole but passive shareholder who technically has the power to control all aspects of the corporation. Since these three *Kelley* cases involved preliminary motions, they have yet to be tried and it is yet to be seen where the court will go with the test.³⁷⁹

The passive, controlling shareholder is the most difficult of the three cases presented and at some point the courts may have to decide the question. In example three, the shareholder has always acted responsibly. What will happen if her son begins disposing of the toxic waste on the property? Ms. Smith does have the power to control the corporation and ultimately the facility but she is not exercising that power. If she is not held liable, would the answer change if she had handed over the management of the company to a notorious toxic waste dumper known to everyone in the pesticide industry including Ms. Smith? Once beyond the first three factors, answers are unclear and require additional considerations. Specifically, when we are considering the liability of a majority shareholder who has the power to control the corporation and the facility but has chosen to be passive, the responsibility with which that shareholder exercises that power must be considered. The passive, majority shareholder is in a position to avoid the harm. As such, she has a duty to exercise that power in a responsible manner. This mesh of control with more traditional notions of duties to others provides a guide in assessing liability against the passive shareholder.

376. *Riverside Mkt. Dev. Corp. v. International Bldg. Prod.*, No. 88-5317, Slip. Op. (E.D. La. May 23, 1990) 1990 U.S. Dist. Lexis 6375.

377. See, e.g., *City of New York v. Exxon Corp.*, 112 Bankr. 540, 548 n.9 (S.D.N.Y. 1990); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 672 (D. Idaho 1986).

378. *Arco Industries*, 723 F. Supp. at 1219; *Thomas Solvent I*, 727 F. Supp. at 1543; *Thomas Solvent II*, 727 F. Supp. at 1561-62. See *supra* text accompanying notes 263-81 for a discussion of these cases.

In determining whether a person "could have prevented" the harm, the court is to look at the power of the person to control the waste disposal practices, including the power of the person in or over the corporation generally, and to the actual responsibility for waste disposal. These two factors seem to be independent. See *supra* text accompanying note 278.

379. As noted earlier, the *Arco Industries* case has been settled. See *supra* note 264.

b. *Arrangers and Transporters*

As discussed earlier, when a corporation is technically an "arranger" or a "transporter" a shareholder can be deemed an arranger or transporter as well if it directly participates in the arranging or transporting. Beyond that, can a shareholder be liable as an arranger or a transporter if it is involved in the management of the corporation or has control over the corporation? Here the interpretation of the statute is more difficult. "Management" or "control" does not connote "arranging" or "transporting" the same way it connotes "operator." Yet Congressional intent to place the cost on the "responsible party" and those who have gained from the harm would seem to support liability. However, the current structure of the liability provisions makes it difficult for a court to impose liability as an arranger or transporter when the shareholder was not actually involved in the arrangements or transportation. Thus, in these categories there is a particular need for Congressional intervention and clarification.

B. *Legislative Action*

CERCLA, as amended in 1986, will expire in 1991 and Congress will have to take affirmative steps to reauthorize the program.³⁸⁰ As part of this reconsideration, Congress should settle the unresolved questions concerning shareholder liability. This will enable courts to apply the statute more easily and it will eliminate the need to resolve the split among the circuits.

Congress should clarify the independent liability of those who happen to act within the corporate form, such as shareholders, officers, directors, and employees, and who are involved with the disposal of hazardous substances by amending the appropriate provisions of sections 9607(a)(1)-(4) or the corresponding definitional provisions in section 9601. For example, Congress can amend the definition of "operator" to include a shareholder (or anyone) who participates in the management of the facility or the responsible corporation. "Arranger" and "transporter" can be amended to include those who control the institutional arranger or transporter. This will take a significant burden from the courts.

V. CONCLUSION

Several questions remain unresolved concerning the liability of shareholders when they are involved in the operations or in control of a facility where hazardous substances have been deposited. Similar questions arise when the shareholders are in control or involved with the corporation responsible for the disposal. Courts will continue to consider these questions and attempt to resolve the questions of shareholder liability. However, given the recent conflict among the circuit courts of appeals, some courts may simply refuse to impose liability on shareholders. This conflict must be resolved eventually by the Supreme

380. Congress reauthorized CERCLA in 1986. See *supra* note 1. It authorized appropriations for CERCLA for a five year period beginning in October 1986. 42 U.S.C.A. § 9611(a) (West 1983 & Supp. 1990).

Court or Congress. Congress should clarify the liability provisions of CERCLA to remove this burden from an already overburdened judiciary. To the extent the courts must continue to decide the question of shareholder liability, they can be guided by the degree of control alone or in combination with more traditional notions of duties owed to others.

